Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BENJAMIN F. CADES, INDIVIDUALLY, AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Petitioner,

v.

H & R BLOCK, INCORPORATED; BENEFICIAL NATIONAL BANK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Does this Court's opinion in Marquette National Bank of Minneapolis v. First of Omaha Service Corp., 439 U.S. 299 (1978), permit a national bank chartered in Delaware to export Delaware usury law to South Carolina where income tax refund anticipation loans were negotiated in face-to-face dealings and made?

2. Do the provisions of the Federal Truth-in-Lending Act, 15 U.S.C. § 1638(b)(1), which requires that a creditor make disclosures before consummation of a transaction permit a lender to acquire an irrevocable assignment of an income tax refund prior to making the required disclosures under the Act?

3. Do the provisions of the Federal Truth-in-Lending Act, 15 U.S.C. § 1606, 15 U.S.C. § 1638(a)(4), and the regulations promulgated thereunder in 12 C.F.R. § 226.17(c)(5) permit the disclosures of an Annual Percentage Rate (APR) based on a loan payable in one year when in essence the loans are loans payable in two to three weeks?

II.

LIST OF ALL PARTIES TO THE PROCEEDINGS

1. Beneficial National Bank (hereinafter referred to as "Beneficial"), a national bank organized and existing under the laws of the State of Delaware.

2. H & R Block, Inc. (hereinafter referred to as "Block").

3. Benjamin F. Cades (hereinafter referred to "Cades"), and other individuals in South Carolina who obtained similar tax refund anticipation loans.

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V.

OPINIONS BELOW

Cades v. H & R Block, Inc. and Beneficial National Bank, is published at 43 F.3d 870 (4th Cir. 1994).

VI.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

i. The opinion of the Fourth Circuit was entered on December 30, 1994.

ii. There was no petition for rehearing and there has been no order granting an extension of time within which to file a petition for writ of certiorari.

iii. Jurisdiction of this Court is involved pursuant to 28 U.S.C. § 1254(1).

VII.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Former 12 U.S.C. § 36(f), 12 U.S.C. § 81, 12 U.S.C. § 85, and 15 U.S.C. § 1638(b)(1).

12 U.S.C. § 36(f) prior to the 1994 amendment states:

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * *

> **(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.**

12 U.S.C. § 81 states:

§ 81. Place of business

The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

12 U.S.C. § 85 states:

§85. Rate of Interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or

District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank if located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

(R.S. §5197; June 16, 1933, c. 89, §25, 48 Stat. 191; Aug. 23, 1935, c. 614, §314, 49 Stat. 711; Oct. 29, 1974, Pub. L. 93-501, Title II, §201, 88 Stat. 1558; Nov. 5, 1979, Pub. L. 96-104, Title I, §101, 93 Stat. 789; Dec. 28, 1979,

Pub. L. 96-161, Title II, §201, 93 Stat. 1235; Mar. 31, 1980, Pub. L. 96-221, Title V, §529, 94 Stat. 168.)

15 U.S.C. § 1638(a)(4) states:

(a) For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:

*** * ***

(4) The finance charge expressed as an "annual percentage rate", using that term. This shall not be required if the amount financed does not exceed $75 and the finance charge does not exceed $5, or if the amount financed exceeds $75 and the finance charge does not exceed $7.50.

15 U.S.C. § 1638(b)(1) states:

(b)(1) Except as otherwise provided in this part, the disclosures required under subsection (a) of this section shall be made before the credit is extended. Except for the disclosures required by subsection (a)(1) of this section, all disclosures required under subsection (a) of this section and any disclosure provided for in subsection (b), (c), or (d) of section 1605 of this title shall be conspicuously segregated from all other terms, data, or information provided in connection with a transaction, including any computations or itemization.

VIII.

STATEMENT OF THE CASE

This case involves the question of whether a national bank in Delaware can export interest rates that it contends are legal in Delaware in connection with income tax refund anticipation loans made in South Carolina and what point in time and in what manner are the truth in lending disclosure statements required to be made.

On February 1, 1991, Cades went to the office of Block to have his 1990 federal and state income tax returns prepared. Block participated in the Internal Revenue Service's electronic filing program which is set forth in Revenue Procedures 91-69. As part of having his federal income tax return prepared electronically, Cades was offered an income tax refund anticipation loan from Beneficial.

Under the Internal Revenue Service's procedures, an electronic return cannot be filed until the taxpayer has signed a declaration for electronic filing (IRS Form 8453) and that form has been received by the Internal Revenue Service ("IRS"). Revenue Procedures 91-69, § 5.08. Generally, individuals cannot file their own tax returns electronically for the tax preparer must be accepted as a participant in the Internal Revenue Service's electronic filing program. Revenue Procedures 91-69, § 3.01. The Revenue Procedures 91-69 and IRS Form 8453 both provide that a taxpayer must elect to have the tax refund directly deposited in a bank and that the direct deposit

election cannot be rescinded. Revenue Procedures 91-69, § 9.03(6)(a), IRS Form 4583.

On February 1, 1991, Cades signed a Priority Application, Consent, Certification and Authorization for Rapid Refund, in which Cades irrevocably assigned his refund to Beneficial and which incorporated IRS Form 8453, and an IRS Form 8453. The Priority Application, Consent, Certification and Authorization for Rapid Refund authorized Beneficial to use the refund irrevocably assigned to it to pay the fees due Block and to deduct from the account where the refund would be deposited the money owed Beneficial. Once Block and Beneficial were advised by the IRS that Cades' return would be accepted under the electronic filing program, that is, that the refund would be electronically deposited into an account at Beneficial by the IRS, Cades returned to the offices of Block where he received the sum of $1,145, representing his federal income tax refund of $1,234 less $89 in fees and charges, $29 being a finance charge, and $45 being the electronic processing fee.

No federal truth-in-lending disclosures were given to Cades on February 1, 1991, when he signed the documents irrevocably assigning his tax refund for direct deposit with Beneficial, and the truth-in-lending disclosures were only given to Cades when he picked up his check on February 3, 1991 at the Block offices in South Carolina. When the disclosures were made, they were made based on a loan having a term of one year, even though the tax refund by the IRS were deposited with Beneficial in two to three weeks, all as set forth on IRS Form 8453.

All documents signed by Cades were signed at the Block office in Florence, South Carolina. The loan was negotiated face-to-face in South Carolina. The proceeds were picked up at the offices of Block in South Carolina. The finance charges were imposed in South Carolina.

Basis for Federal Jurisdiction in the Court of First Instance.

The jurisdiction of the United States District Court for the District of South Carolina was questioned below in a motion to remand. This action was commenced in the Court of Common Pleas of Florence County, South Carolina. Initially, Beneficial and Block removed this action based on diversity of citizenship, 28 U.S.C. § 1332. After a motion to remand was filed, Block and Beneficial sought to raise federal question jurisdiction. After the motion to remand was denied, Cades amended his complaint to allege violations of the Federal Truth-in-Lending Act, 15 U.S.C. § 1601, et seq., and violations of the National Banking Act. From a final judgment of the United States District Court for the District of South Carolina granting summary judgment to Beneficial and Block, Cades appealed that order, including the ruling on Cades' motion to remand, to the United States Court of Appeals for the Fourth Circuit. The United States Court of Appeals for the Fourth Circuit had jurisdiction over that appeal by virtue of 28 U.S.C. § 1291.

IX.

ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR ALLOWANCE OF CERTIORARI

The District Court for the District of South Carolina and the Fourth Circuit Court of Appeals have departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision as to the National Bank Act issue and as to the truth-in-lending issue relating to the amount of the APR disclosed. In ruling on the truth-in-lending issues of when truth-in-lending disclosures must be made, this decision is in conflict with the decisions of the Second Circuit Court of Appeals in Murphy v. Empire of America, 746 F.2d 931 (2nd Cir. 1984) at 934, and the Ninth Circuit in Waters v. Weyerhaeuser Mortgage Company, 582 F.2d 503 (9th Cir. 1978).

In Murphy, supra, the 3-day right of rescission which, under 15 U.S.C. § 1635(a) begins to run upon consummation of the transaction, began to run on the date that the loan commitment was signed and disclosures given, not on the date that the mortgage was signed. In Waters, supra, the court held that "consummation" occurs whenever a contractual relationship is created--not at the time of performance.

In Marquette Nat'l Bank of Minneapolis v. First of Omaha Service Corp., 439 U.S. 299 (1978), this Court approved of a national bank exporting the state law where it was located to other states in connection with the issuance of credit cards. In Marquette, the facts were that the finance charges that were assessed were in fact assessed in Nebraska, not in Minnesota; that the Bank

Americards which were the subject matter of the credit transactions were issued by First of Omaha in Omaha, Nebraska, not in Minnesota; and the Bank Americard program was located in Nebraska, not in Minnesota.

In connection with the exportation of Delaware law to South Carolina with tax refund anticipation loans, the face-to-face negotiations for the loan; the signing of all the documents; the picking up of all checks; and all aspects of these loans took place in South Carolina. In fact nothing occurred in Delaware, other than the facts that the information to print the checks was electronically transmitted from Delaware to South Carolina and that the income tax refunds were electronically transferred from the IRS to a bank account in Delaware at Beneficial. Both the District Court and the Fourth Circuit Court of Appeals failed to read the provisions of the National Bank Act, 12 U.S.C. § 81, former 12 U.S.C. § 36(f), and 12 U.S.C. § 85, together; and, as part of a comprehensive statute regulating national banks. A national bank must transact business in the place specified in its organizational certificate and in the branches established and permitted by law. 12 U.S.C. § 81. A branch bank is defined as a place where deposits are received, checks paid or money lent. Former 12 U.S.C. § 36(f). In First Nat'l Bank of Plant City v. Dickinson, 396 U.S. 122 (1969), this Court was faced with the issue of whether or not a bank's armored car service and secured receptacles for receipt of monies intended as deposits were "branches" as that term is defined by former 12 U.S.C. § 36(f). This Court held that, since former 12 U.S.C. § 36(f) was phrased in the disjunctive, the offering of any one of those three services would form the basis for a finding of a "branch" bank. 396 U.S. 135. This Court also held that while parties are free to arrange

their private rights and liabilities as they see fit, the parties could not, by the terms of a contract, define whether or not a branch did or did not exist at a certain location.

If Beneficial could not legally have branches at the Block offices in South Carolina, it cannot export Delaware law to South Carolina by making loans at Block offices in South Carolina.

If this Court's opinion in Marquette, supra, is given the construction given it by the Fourth Circuit in this case, there will be no restriction on a national bank's ability to export its rates. Historically, we have had a dual system of banking in this country. Until the passage of the Riegle-Neal Banking Act of 1994, Public Law 103-328, the Federal Reserve board could not approve an acquisition of a bank unless specifically authorized by state law. 12 U.S.C. § 1842(d) before the 1994 amendment.

Even though banks now have more opportunity to expand across state lines with the passage of the Riegle-Neal Bank Act of 1994, this change in policy has been:

a) Accomplished by the Congress, not by court rulings;

b) Accompanied with certain statutory restrictions, including limitations on the rights of states to required that a portion of the bank's assets be used for state-sponsored housing entities, limitations on concentration, compliance with the Community Reinvestment Act of 1977, the right of states to opt out of interstate merger transactions

and the statutory preservation of state laws relating to community reinvestment, consumer protection, and fair lending. See 12 U.S.C. § 36(f) after the enactment of the Riegle-Neal Banking Act of 1994. P.L. 103-328 § 102(f)(1)(A).

If the Fourth Circuit opinion is allowed to stand, banks will be allowed to ignore the restrictions on interstate banking imposed by the Riegle-Neal Banking Act, including state consumer protection statutes provided by P.L. 103-328 § 102(f)(1)(A) by merely setting up loan production offices and claim that under this court's decision in Marquette, supra, such lending is allowed under 12 U.S.C. § 85. This Court should not allow the delicate balance that exists between state and federal regulation of banks to be completely eroded by an expansive reading of this Court's opinion in Marquette, supra.

For 200 years, the conflicts that existed between Thomas Jefferson and Alexander Hamilton, including the conflicting ideas about banking, have continued. Dumas Malone, in Jefferson and the Rights of Man (Little, Brown & Co. 1951), began Chapter 16 entitled "Working with Hamilton":

> "...these two men have become symbols of a conflict of ideas which runs through the whole of American national history. No other American statesman has personified national power and the rule of the favored few so well as Hamilton, and no other has glorified self-government and the freedom of the individual to such a degree as Jefferson."

Congress, in allowing for our dual system of banking and dual system of regulation has attempted to achieve some balance between these two philosophies. That compromised balance should not be emasculated by the board reading of Marquette, supra, adopted by the Fourth Circuit.

In passing the Truth-in-Lending Act, Congress intended to require that meaningful disclosure of credit terms be made so that consumers would know the true cost of credit prior to entering into lending contracts. Congress required that the disclosures shall be made before credit is extended. 15 U.S.C. § 1638(b)(1). Regulation Z, § 226.17(b), requires that the disclosures be made before consummation. The adverb "before" means "in front", "preceding", not at the same time or contemporaneously. Making the disclosures at the same time that a check is handed to Cades is not making the disclosures "before the credit is extended" or "before consummation."

Contrary to the position of the Fourth Circuit in Murphy v. Empire of America, 746 F.2d 931 (2nd Cir. 1984), the 3-day right of rescission provided by 15 U.S.C. § 1635 was held to begin to run, not when the mortgage was signed but when the loan commitment was signed. In this case, irrevocably transferring to Beneficial income tax refunds on February 1, 1991 has the same effect as entering into a loan commitment agreement. Also, value was given in that these funds were being assigned not just to pay the loan, but to also pay Block. Under IRS procedures and as IRS Form 8453 states this election, once made, cannot be changed.

Beneficial made the truth-in-lending disclosures and disclosed that the APR would be 2.406 percent and based that disclosure on its assertion that the loan was a "demand" loan and relied on the first sentence of 12 C.F.R. § 226.17(c)(5). That was not the correct APR required to be disclosed under 15 U.S.C. § 1638(a)(4). The disclosures made were anything but "truthful." IRS Form 8453, which was an integral and necessary part of the loan transaction and was incorporated into the irrevocable assignment to Beneficial specifically provides that the refund should arrive within two or three weeks. In ruling on this issue, the Fourth Circuit failed to read the second sentence of Regulation Z, 12 C.F.R. § 226.17(c)(5) which provides:

> If an alternative maturity date is stated in the legal obligation between the parties, the disclosure shall be based on that date.

This loan was not a "demand loan" as that term is defined by Article 3, Section 108 of the Uniform Commercial Code, S.C. Code Ann. § 36-3-108. This loan was to be paid when the IRS refund was received by Beneficial which was two to three weeks. The staff commentary to Regulation Z, § 226.17(c)(17), specifically addresses refund anticipation loans and provides that the disclosures should be based on the creditor's estimate of the time that the refund will be delivered, even if the loan also contains a demand clause. The departure by the Fourth Circuit from the plain meaning of the statute and regulations calls for this Court to exercise its supervisory powers.

X.

CONCLUSION

This Court should grant this petition for certiorari and reverse the decision of the Fourth Circuit so that the Fourth Circuit's expansive application of this Court's decision in Marquette, supra, does not destroy the delicate balance of regulating banking legislated by Congress. This Court should also grant certiorari and reverse the decision of the Fourth Circuit on the two Truth-in-Lending Act issues so that the plain meaning of "before" will not be circumvented and so that truthful disclosures of the Annual Percentage Rate are in fact made.

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APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 93-2555

BENJAMIN F. CADES, individually,
and on behalf of all persons
similarly situated,

Plaintiff-Appellant,

v.

H & R BLOCK INCORPORATED;
BENEFICIAL NATIONAL BANK,

Defendants-Appellees.

STATE OF WEST VIRGINIA; STATE OF MICHIGAN; STATE OF KENTUCKY; STATE OF CONNECTICUT; IOWA DIVISION OF BANKING; ARKANSAS STATE BANK DEPARTMENT; AMERICAN BANKERS ASSOCIATION; AMERICAN FINANCIAL SERVICES ASSOCIATION; CONSUMER BANKERS ASSOCIATION; DELAWARE BANKERS ASSOCIATION; MARYLAND BANKERS ASSOCIATION; NORTH CAROLINA BANKERS ASSOCIATION; SOUTH CAROLINA BANKERS ASSOCIATION; VIRGINIA BANKERS ASSOCIATION; ILLINOIS COMMISSIONER OF BANKS AND TRUST COMPANIES; DELAWARE STATE BANK COMMISSIONER; STATE OF OHIO; COMMISSIONER OF THE NEVADA DIVISION OF FINANCIAL INSTITUTIONS;

COMMISSIONER OF FINANCIAL INSTITUTIONS OF THE STATE OF UTAH; SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS,

Amici Curiae

Appeal from the United States District Court for the District of South Carolina at Florence. William B. Traxler, Jr., District Judge. (CA-92-1454-4-21)

Argued: June 7, 1994

Decided: December 30, 1994

Before HAMILTON, Circuit Judge, BUTZNER, Senior Circuit Judge, and GARBIS, United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Senior Judge Butzner wrote the opinion, in which Judge Hamilton and Judge Garbis joined.

COUNSEL

ARGUED: George Grice Reaves, REAVES & MOORE, Florence, South Carolina, for Appellant. Jeffrey S. Saltz, WOLF, BLOCK, SCHORR & SOLIS-COHEN, Philadelphia, Pennsylvania, for Appellees. ON BRIEF: Benjamin D. Moore, REAVES & MOORE, Florence, South Carolina; John B. Long, DYE, TUCKER, EVERITT, WHEALE & LONG, Augusta, Georgia, for

Appellant. Alan S. Kaplinsky, WOLF, BLOCK, SCHOOR & SOLIS-COHEN, Philadelphia, Pennsylvania; Thornwell F. Sowell, J. Calhoun Watson, Barbara E. Brunson, NELSON, MULLINS, RILEY & SCARBOROUGH, Columbia, South Carolina, N. Louise Ellingsworth, SMITH, GILL, FISHER & BUTTS, Kansas City, Missouri; Wheeler Neff, Assistant General Counsel, BENEFICIAL CORPORATION, Wilmington, Delaware, for Appellees. Darrell L. Dreher, Steven T. Catlett, Charles M. Oellermann, JONES, DAY, REAVIS & POGUE, Columbus, Ohio, for Amici Curiae.

OPINION

BUTZNER, SENIOR CIRCUIT JUDGE:

Benjamin F. Cades appeals district court orders denying his motion to remand his complaint to state court and granting defendants H & R Block and Beneficial National Bank summary judgment. We affirm.

I

This action arose in connection with a financial service known as a refund anticipation loan (RAL), which enables a consumer to borrow funds on a short-term demand basis in the amount of the consumer's expected federal income tax refund. Block, like many tax services, offers its customers an electronic filing and rapid refund program. In connection with the rapid refund program, Beneficial agreed to loan qualified Block customers the amount of the taxpayer's expected refund, less a flat finance charge of $29.

On February 1, 1991, in the course of processing Cades's 1990 federal tax returns, a Block representative orally explained to Cades the terms of Beneficial's RAL. He informed Cades that Beneficial charged a $29 financing fee. In addition, he explained that Block charged either $25 or $35 electronic filing. For $25 plus the $29 finance charge, a taxpayer would receive his federal income tax refund less charges from Beneficial and Block in eight days; for $35 plus the finance charge, the net refund would arrive in two days. Cades chose the latter option.

The Block representative gave Cades Beneficial's RAL application. The Block representative entered Cades's credit and other information on the application, and Cades signed it. By signing, Cades transferred to Beneficial his interest in his tax refund to the extent of his RAL. Cades also signed Internal Revenue Service Form 8453, the Federal Income Tax Declaration for Electronic Filing. He requested on this form that his federal income tax refund the directly deposited into an account in his name at Beneficial. Block submitted the application to Beneficial's office in Delaware for approval by Beneficial.

Beneficial approved the loan, and on February 3, 1991, it transmitted to Block's offices a cashier's check in the amount of $1145, representing Cades's federal income tax refund of $1234, minus $89 in charges. On the reverse of the check and on an attached stub were the terms of the loan agreement. The agreement provided, in part: "By endorsing this check above, you promise to pay us on demand the amount set forth in the 'Total of Payments' section on the attached check stub." The stub stated that the APR on the loan was 2.406 percent. Cades endorsed the check.

Beneficial is a national bank with chartered address and headquarters in Delaware. Block is a Missouri corporation with retail offices and franchisees nationwide. No corporate affiliation exists between Beneficial and Block.

Cades brought suit against Block and Beneficial in the South Carolina Court of Common Pleas, alleging that the fees charged by them violated numerous provisions of the South Carolina Consumer Protection Code and the South Carolina Unfair and Deceptive Trade Practices Act. He asked the court to certify a class action, and sought treble actual damages (in the amount of the electronic filing fee and finance charge), punitive damages, and attorneys' fees.

The defendants filed a timely notice of removal to federal court under 28 U.S.C. § 1446(a), alleging diversity jurisdiction under 28 U.S.C. § 1332. Cades moved to remand to state court. The defendants amended their notice of removal to allege federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337. Cades responded to this amended notice nearly three months later. The district court denied his motion to remand. Cades then amended his complaint to allege violations of the National Bank Act, 12 U.S.C. § 86, and the Truth in Lending Act, 15 U.S.C. § 1061 *et seq.* The district court granted summary judgment to the defendants on all counts in Cades's amended complaint.

II

Cades contends that the district court improperly assumed removal jurisdiction. He asserts that although

the parties are of diverse citizenship, the requisite amount in controversy is lacking.

We need not address Cades's concern about the amount in controversy, for it is clear that after Cades amended his complaint to charge violations of the National Bank Act and the Truth in Lending Act, federal jurisdiction appeared on the face of his amended complaint. Had the action set forth in the amended complaint been brought initially in federal court, the district court would have had original jurisdiction. *See Burns v. American Nat'l Bank and Trust Co.*, 479 F.2d 26, 29-30 (8th Cir. 1973) (National Bank Act); 15 U.S.C. § 1640(e) Truth in Lending Act). At the time the district court decided the case on its merits and entered final judgment, federal jurisdiction was firmly established. In *American Fire & Casualty Co. v. Finn,* 341 U.S. 6 (1951), the Court explained that an initial lack of the right to removal may be cured when the final posture of the case does not wrongfully extend federal jurisdiction:

> There are cases which uphold judgments in the district courts even though there was no right to removal. In those cases the federal trail court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment. That is, if the litigation had been initiated in the federal court on the issues and between the parties that comprised the case at the time of trial or judgment, the federal court would have had cognizance of the case.

341 U.S. at 16 (citation omitted); *accord Able v. Upjohn Co.*, 829 F.2d 1330, 1333 (4th Cir. 1987).

Cades protests that the defendants' amended notice of removal specifying federal question jurisdiction was untimely and that the district court improperly considered it.

A motion to remand the case because of a defect in removal procedure must be made within 30 days after filing the notice of removal. 28 U.S.C. § 1447(C). An untimely removal is a defect in removal procedure. Comment on the 1988 Revision of section 1447 following 28 U.S.C.A. § 1447 (West 1994).

Cades did not object to the amended notice of removal until nearly three months after the defendants filed the amended notice. We agree with the district court that, even assuming the amended notice of removal was filed late, Cades's objection was untimely.

III

Title 12 U.S.C. § 85 authorizes a national bank to charge interest at rates permitted by the laws of the state in which the bank is located. The district court found that Beneficial was locate din Delaware and rules that its $29 finance charge complied with Delaware law. Cades assigns errors to these rulings.

In *Marquette Nat'l Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), the Supreme Court held that, even though a national bank solicited credit card customers through agents in another state, it was authorized to charge interest on card indebtedness at

the rate allowed by the state where it was located. Beneficial and Block contend that section 85 as applied in *Marquette* governs this case. Cades attempts to distinguish *Marquette* from the present case. Essentially, he asserts that in *Marquette*, cards were issued, credit was advanced, and finance charges were assessed in the national bank's home state. He argues that in this case, by contract, the loan transaction occurred in South Carolina: he signed all the relative documents there; he had face-to-face dealings with Block representatives relating to his loan there; and finance charges were assessed there.

The asserted distinctions are not convincing. It is undisputed that the loan was approved in Beneficial's Delaware office, not in South Carolina. The loan proceeds originated in Delaware and were later transmitted to South Carolina. Both *Marquette* and this case involved face-to-face solicitation of out of state consumers by agents of a national bank. In both instances, the interest rate a national bank my charge is governed by section 85, which looks to the interest rates allowed by the state where the bank is located--not where the borrower is located or where the loan transaction may be said to have occurred.

Cades next insists that we should read section 85 in the context of the National Bank Act's provisions prohibiting branch banking by national banks. He argues that under 12 U.S.C. § 81, a national bank may transact business only in the state in which it is located. He contends that Beneficial's RAL was made in Block's South Carolina office and that office therefore constitutes a "branch office" of Beneficial, as defined in 12 U.S.C. § 36(f). Beneficial's unlawful branch activities in South

Carolina, he concludes, are outside the preemptive protection of section 85 and must comply with South Carolina's usury laws.

This argument is flawed. As the district court noted, courts apply a two-part test to decide whether a bank is operating a branch office. First, the court determines whether a branch is 'establish[ed] and operate[d]" by the bank under section 36(c). If a branch is found to exist, then court then asks where the branch office is transacting branch business under section 36(f) by accepting depositions, paying checks, or lending money. *See Independent Banks Ass'n of New York v. Marine Midland Bank,* 757 F.2d 453, 456-63 (2d Cir. 1985); *cf. Independent Bankers Ass'n of America v. Smith,* 534 .2d 921, 951-52 (D.C. Cir. 1976).

The district court correctly held that the relationship of Beneficial and Block fails the first part of the test for identifying a branch office. Beneficial has no ownership or leasehold interest in Block's South Carolina offices. No Beneficial employees work in Block's offices. Beneficial exercises no authority or control over Block's employees or methods of operation. Therefore, Block's South Carolina offices are not branch offices established and operated Beneficial. Quite properly the district court did not need to reach the second part of the test. Cades's argument that South Carolina's usury laws apply in this case therefore fails.

The next question is whether Delaware law permitted Beneficial to charge Cades at $29 financing fee. Delaware Code Ann. tit. 5, § 965 (1993) states:

> [I]n lieu of periodic interest...a bank may charge and collect, as interest, in respect of a loan...[I] fees, points, finders fees and other front-end and periodic charges; provided, however, that int he case of a loan to an individual borrower, no such front-end or periodic charge may be charged and collected unless the agreement governing, or the bond, note, or other evidence of, the loan so provides....

The documents relating to Cades's transaction expressly provide for the collection of a $29 finance charge. The district court correctly ruled that the finance charge collected by Beneficial complied with Delaware law and 12 U.S.C. § 85.

We note the arguments of Cades and amici supporting him that upholding the district court no this issue will erode state sovereignty in the area of consumer lending and emasculate state usury laws. The Supreme Court considered and rejected a similar argument in *Marquette*:

> Petitioners' final argument is that the "exportation" of interest rates, such as occurred in this case, will significantly impair the ability of States to enact effective usury laws. This impairment, however, has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates....[T]he protection of state usury laws is an issue of legislative

> policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.

439 U.S. at 318-19.

IV

Cades raises two claims under the Truth in Lending Act. First, he alleges that Beneficial understated the annual percentage rate (APR) on his loan. He contends that Beneficial violated the Act's requirement that a creditor disclose to the consumer the finance charge, expressed as an annual percentage rate. *See* 15 U.S.C. § 1638(a)(4).

The Act provides that no creditor can be held liable for any act done or omitted in good faith conformity with any rule, regulation, or interpretation by the Federal Reserve Board. 15 U.S.C. § 1640(f); *see Warren v. Credithrift of America, Inc.*, 599 F.2d 829, 831-32 (7th Cir. 1979). Pursuant to its authority under section 1604, the Federal Reserve Board has adopted Regulation Z, 12 C.F.R. pt. 226 (1993), to implement the Act. The Board has also issued the Official Staff Commentary to Regulation Z and the Act. The regulations and staff commentary are "dispositive" unless "demonstrably irrational." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980).

The maturity date and corresponding APR of a loan depend on whether the loan is payable on demand or at a specified time. Section 226.17(c)(5) of Regulation Z reads: "If an obligation is payable on demand, the

creditor shall make the disclosures based on an assumed maturity of 1 year. If an alternate maturity date is stated in the legal obligation between the parties, the disclosures shall be based on that date." The disclosures, contained on a stub attached to Beneficial's loan check, describe the loan as payable "on demand." No other language relating to the loan's maturity date appears on the loan application, check, or attached stub.

Cades argues that his agreement with Beneficial did not give rise to a true demand obligation. Beneficial's usual practice, he contends, was to collect on an outstanding RAL as soon as the IRS deposited the consumer's tax refund into its account. He points out that IRS Form 8453, to which the loan application refers, states that refunds should arrive within two to three weeks after filing. He concludes that the APR should have been based on the "alternate maturity date" of two to three weeks estimated in Form 8453. Had Beneficial calculated its loan rate based on a three week maturity period, the APR would be about 17 times the stated rate of 2.406 percent.

The Official Commentary to Regulation Z explains that the terms of the obligation are to be found int he wording of the loan documents: "Disclosures for demand obligations are based on an assumed 1-year term, unless an alternate maturity date is stated in the legal obligation." 12 C.F.R. pt. 226, Supp. I, comment 17(c)(5)-1. Further, section 226.17(c)(1) emphasizes that the disclosures required depend only on the terms of the parties' legal obligations, not on the prevailing practice of a creditor. It provides: "The disclosures shall reflect the terms of the legal obligation between the parties." This precept is amplified by 12 C.F.R. pt. 226, Supp. I,

comment 17(c)(1)(-17, which recognizes that in accordance with the terms of the legal obligation, a creditor may either require payment of an RAL on demand or require payment when the refund is made. The comment explains that to determine when repayment is required, one must look to the terms of the legal obligation between the parties.

Form 8453 says nothing about when the RAL is payable, It merely provides taxpayers an estimate of when refund checks will arrive. Nor does the loan agreement anywhere provide that the RAL is payable immediately after the IRS deposits the refund int o the account at Beneficial. The agreement between Cades and Beneficial is, by its terms, a demand obligation. Beneficial properly based the APR of the loan on a maturity date of one year. The district court correctly granted summary judgment on this claim.

In Cades's second Truth in Lending Act claim, he alleges that Beneficial failed to provide him with the necessary disclosures in a timely manner. Cades does not dispute that the disclosures were attached to the cashier's check he signed on February 3. Rather, he contends that Beneficial should have provided the disclosures on February 1, the date he signed the loan application. He argues that the assignment of his tax refund to Beneficial was irrevocable on February 1 and that Beneficial obtained a security interest int he tax refund proceeds on February 1. He asserts that the transaction was consummated on February 1, rather than on February 3.

Cades argues that the purpose of the Act, to give consumers a meaningful opportunity to shop for credit, requires that disclosures in RAL transactions be given at

the time of application, rather than immediately before the consumer endorses his loan check. He points out that the Act is intended to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available." 15 U.S.C. § 1601(a).

The Act requires a creditor to maker the required disclosures "before credit is extended." 15 U.S.C. § 1638(b)(1). Section 226.17(b) of Regulation Z states: "The creditor shall make disclosures before consummation of the transaction." Regulation Z defines consummation as "the time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2(a)(13). In *Murphy v. Empire of America*, 746 F.2d 931, 934 (2d Cir. 1984), the court stated: "The transaction is consummated when the lender and borrower sign a contract obligating them, respectively, to lend and to borrow the funds." The Official Commentary states that whether a contract exists is "to be determined under applicable law." 12 C.F.R. pt. 226, Supp. I, comment 2(a)(13).

The loan application signed by Cades does not commit him to borrow funds from Beneficial. It states that it is being submitted "for the purpose of enabling [Beneficial] to determine whether or not to make a Refund Anticipation Loan" to the applicant. Under both Delaware and South Carolina law, Beneficial's security interest in Cades's tax refund was unenforceable until Cades endorsed his loan check on February 3, because Beneficial had given no value to Cades until that time. *See* Del. Code Ann. tit. 6, § 9-203(1)(b)(1993); S.C. Code Ann. § 36-9-203(1)(b)(1993).

Cades provides no authority to support his claim that the loan transaction was consummated at the time he signed the loan application, or that the broad purposes of the Act should override its specific provisions. In *Bissette v. Colonial Mortgage Corp. of D.C.*, 477 F.2d 1245 (D.C. Cir. 1973), the court held that a mortgagee bank was not required to make Truth in Lending Act disclosures to the borrowers until closing. It rejected the borrowers' argument that statutory policy required earlier disclosure, stating that the language of the statute and regulations was clear. 477 F.2d at 1247. *Accord Waters v. Weyerhauser Mortgage Co.*, 582 F.2d 503, 505 (9th Cir. 1978).

In holding that the transaction was not consummated until February 3, we reject Cades's argument that his irrevocable assignment of his tax refund to his account at Beneficial, through his direct deposit election on IRS Form 8453, effectively transferred all his rights int he refund to Beneficial. Funds in a depositor's account, absent an agreement to the contrary, represents a debt by the bank to the depositor and may be withdrawn by the depositor upon demand. *See Bank of Marin v. England*, 385 U.S. 99, 101 (1966).

Beneficial did not become entitled to apply the deposited funds to Cades's loan until Cades endorsed his loan check on February 3. Because Beneficial provided the required disclosures to Cades before the loan was consummated by his endorsement of Beneficial's check, the district court correctly granted summary judgment on this claim.

V

We need not consider Cades's state law claims because he did not argue them in his briefs. *See United States v. Williams,* 378 F.2d 665, 666 (4th Cir. 1967).

AFFIRMED

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BENJAMIN F. CADES, INDIVIDUALLY, AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Petitioner,

v.

H & R BLOCK, INCORPORATED; BENEFICIAL NATIONAL BANK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA FLORENCE DIVISION

C/A No. 4:92-1454-21

BENJAMIN F. CADE, individually, and on behalf of all persons similarly situated,

Plaintiffs,

v.

H & R BLOCK INCORPORATED; BENEFICIAL NATIONAL BANK,

Defendants.

ORDER

Before the court is the motion of the plaintiffs (collectively "Cade") to remand this case pursuant to 28 U.S.C. § 1447(c) on the grounds that this court lacks subject matter jurisdiction. I deny the motion to remand.

This action was originally filed in state court. Pursuant to 28 U.S.C. § 1446(a), the defendants ("H & R Block" & "Beneficial") timely removed this case on diversity jurisdiction grounds. 28 U.S.C. § 1332. Cade contends that the court lacks subject matter jurisdiction

because the amount in controversy does not exceed $50,000. I disagree.

In this case, not one of the claims of the individual plaintiffs exceeds $50,000. However, the amount in controversy is not solely determined by looking to the monetary claim of the plaintiff:

> It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some case by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment.

Smith v. Adams, 130 U.S. 167, 175 (1889). More recently, the Second Circuit reaffirmed the principal announced in Smith: "We agree with the appellee that the amount in controversy is not necessarily the money judgment sought or recovered but rather the value of the consequences which may result from the litigation." Beacon Constru. Co. v. Matco Elec. Co., 521 F.2d 392, 399 (2nd Cir. 1975); accord Ronzio v. Denver & Rio Grande W. R.R. Co., 116 F.2d 604, 606 (10th Cir. 1940) ("In determining the matter in controversy, we may look to the object sought to be accomplished by the plaintiffs' complaint; the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce.") (footnote omitted). Moreover, there is authority in the District of

South Carolina for determining the amount in controversy from the viewpoint of either the plaintiff or the defendant. Congaree Broadcasters, Inc. v. TM Programming, Inc., 436 F. Supp. 258, 262 (D.S.C. 1977).

In addition to seeking monetary damages, Cade seeks to enjoin the defendants from charging alleged usurious interest on loans made in connection with the processing of income tax rapid refunds. If successful, the injunctive cost to the defendants would greatly exceed $50,000. Accordingly, the requirements for diversity jurisdiction exist because there is complete diversity of citizenship between the parties and the amount in controversy from the defendants' viewpoint exceeds $50,000. Smith, at 175; Beacon Constr., at 399; Ronzio, at 606; Congaree Broadcasters, at 262.

In any event, on June 12, 1992, Beneficial filed an amended notice of removal, which H & R Block joined, asserting federal question jurisdiction. Over three months later, Cade objected to the amended notice of removal on the grounds that it was untimely filed.

"The statutory time limit for removal is merely a formal and modal requirement and is not jurisdictional." Fristoe v. Reynolds Metals Co., 615 F.2d 1209, 1212 (9th Cir. 1980). Because time limit objections are not jurisdictional in nature, they are by necessity procedural in nature. See Baris v. Sulpico Lines, 932 F.2d 1540, 1544 (5th Cir.), cert. denied, 112 S.Ct. 430 (1991). A motion to remand based upon procedural defects must be

made within thirty days of the filing of the notice of removal. 28 U.S.C. § 1447(c).

Assuming, without deciding, that the amended notice of removal was untimely, this procedural defect was waived by Cade because Cade did not timely object as required by § 1447(c). Further, Cade did not raise the timeliness objection at a September 10, 1992 hearing on the issue of remand. Accordingly, Cade is precluded from objecting to the amended notice of removal at this late date. "Although the time limit is mandatory and a timely objection to a late petition will defeat removal, a party may waive the defect or be estopped from objecting to the untimeliness by sitting on his right." Fristoe, at 1212.

THEREFORE, the plaintiffs' motion to remand is denied. IT IS SO ORDERED.

_____

WILLIAM B. TRAXLER, JR.
UNITED STATES DISTRICT JUDGE

Greenville, South Carolina
February 2, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA FLORENCE DIVISION

C/A No. 4:92-1454-21

BENJAMIN F. CADE, individually, and on behalf of all persons similarly situated,

Plaintiffs,

v.

H & R BLOCK INCORPORATED; BENEFICIAL NATIONAL BANK,

Defendants.

O-R-D-E-R

Before the court is the renewed motion of the defendant H & R Block, Inc. ("Block") to dismiss or for summary judgment as to all claims of the plaintiffs (collectively "Cade").[1] Because matters outside the scope

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[1]Block and defendant Beneficial National Bank have filed prior motions to dismiss Cade's action. On April 15, 1993, this court held a hearing on the motions to dismiss, but declined to rule on the motions at that time because Cade was granted leave to amend his complaint. At the April hearing, the court instructed the parties that

of the pleadings have been considered, Block's motion shall be treated as one for summary judgment. After reviewing the memoranda submitted by the parties, and after considering oral arguments, I grant the summary judgment motion of Block as to Cade's first, fourth, and fifth claims; and paragraphs (b) and (d) of the third claim.[2]

SUMMARY JUDGMENT STANDARD

Fed.R.Civ.P. 56(c) states, as to a party who has moved for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.

Accordingly, to prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that he is entitled to judgment as a matter of law. As to the first

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any renewed motion to dismiss would be treated as a motion for summary judgment.

[2]This court finds the memoranda submitted to be thorough and to preclude the necessity of additional oral argument. Local Rule 12.08, D.S.C.

of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. Id. at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist which give rise to a genuine issue. Id. at 324. Accordingly, when Rule 56(e) has shifted the burden of proof to the non-movant, he must produce existence of every element essential to his action which he bears the burden of adducing at a trial on the merits.

Summary judgment serves the useful purpose of disposing of meritless claims before the court and the parties become entrenched in frivolous litigation. Donahue v. Windsor Locks Bd. of Fir Comm'rs, 834 F.2d 54, 58 (2nd Cir. 1987). Although summary judgment is an extreme remedy, the courts should not be

reluctant to grant summary judgment in appropriate cases; indeed, summary judgment is mandated where appropriate. Herman v. City of Chicago, 870 F.2d 400, 404 (7th Cir. 1989); Mieri v. Dacon, 759 F.2d 989, 998 (2nd Cir. 1985), cert. denied, 474 U.S. 829 (1985); United States v. Porter, 581 F.2d 698, 703 (8th Cir. 1978); Estate of Detwiler v. Offenbecher, 728 F.Supp. 103, 134 (S.D.N.Y. 1989); Burleson v. Illinois Farmers Ins., 725 F.Supp. 1489, 1490 (S.D. Ind. 1989). In a recent trilogy of decisions--Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986)--the Supreme Court has consistently reaffirmed its endorsement of pretrial resolution and summary disposition of baseless actions. These decisions reflect the mandatory nature of Rule 56. In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Court held:

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'...Rule 56 must be construed with due regard not only for the rights of person asserting claims and

> **defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of person opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.**

Id. at 327 (citations omitted).

FACTS

The following facts are undisputed. Block is a corporation which offers tax consultation and preparation services nationwide through a network of retail offices operated by Block or its franchisees. (Affidavit of Edward B. Feinstein, ¶ 2.)[3] Defendant Beneficial National Bank ("Beneficial") is a full service national banking association with its charter address and headquarters in Wilmington, Delaware. (Affidavit of Wheeler K. Neff, ¶ 2.)[4] Beneficial has not established, nor attempted to establish, any branch banks outside of

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[3]Feinstein is the Assistant Vice President and Director of Field Automated Systems of H&R Block Tax Services, Inc. and H&R Block Eastern Tax Services, Inc. H&R Block Eastern Tax Services, Inc. is a wholly-owned subsidiary of H&R Block Tax Services, Inc. In turn, H&R Block Tax Services, Inc. is a wholly-owned subsidiary of Block.

[4]Neff is Senior Vice President of Beneficial. The facts refer to the latest affidavits of Neff and Feinstein both of which were filed on June 11, 1993.

Delaware. (Id. ¶ 13.) Block and Beneficial are separate and distinct corporations that are not affiliated. (Feinstein Aff. ¶ 7.) Moreover, Beneficial employees do not work in Block's offices, nor does Beneficial exercise any control or supervision over Block's operations. Additionally, Beneficial does not advertise in Block's offices, or pay rent in any form to Block. (Neff. Aff. ¶¶ 7-11.); (Feinstein Aff. ¶¶ 13-14-).

Block like countless other tax services across the nation, offers its customers electronic filing of federal income tax returns through its rapid refund program. In connection with its rapid refund program, Block and Beneficial entered into an agreement whereby Beneficial agreed to loan qualified Block customers the amount of a taxpayer's expected tax refund (Neff Aff. ¶ 3.), less a $29 finance charge.[5] Although Beneficial's loan documents are filled out in Block's offices, the loan application information is electronically forwarded to Beneficial's Delaware offices where Beneficial itself determines whether to make the refund anticipation loan. (Neff Aff. ¶¶ 4-6); (Feinstein Aff. ¶¶ 8-11.) If the loan is approved, a Beneficial cashier's check is issued to the customer. (Neff Aff. ¶ 6.) With regard to the refund

[5]The $29 finance charge is a flat fee which does not vary with size of the loan, and is expressly provided for in Beneficial's loan documents. (Neff Aff. ¶ 12.)

anticipation loan program, Block is not a lender. (Feinstein Aff. ¶ 6.)[6]

Cade brought this action against Block and Beneficial alleging a variety of state and federal claims. At the heart of this case, however, there is but one complaint. Essentially, Cade contends that Beneficial, through Block (Beneficial's "branch office"), charges usurious rates of interest on the refund anticipation loans.

DISCUSSION

In his amended complaint, Cade asserts five claims against Block and Beneficial: (1) 12 U.S.C. § 85 claim; (2) federal Truth in Lending Act claim; (3) state law unconscionability claim; (4) state law unfair or deceptive trade practices claim; and (5) a claim that the defendants failed to comply with an assortment of state supervised lender laws. In short, all five of Cade's claims allege that Block and Beneficial, acting in their capacity as lenders, violated numerous federal and state laws.

Block, however, is not a lender in the refund anticipation loan transaction. Instead the undisputed facts show that Block acts as Beneficial's disclosed agent. Block employees simply assist its customers in completing

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[6]Block charges all of its customers a tax preparation fee, and charges an additional fee for electronic filing of income tax returns. (Feinstein Aff. ¶ 15.) As a result, a customer who obtains a refund anticipation loan must pay a $29 finance charge to Beneficial and a $35 electronic processing fee to Block.

Beneficial loan applications for Beneficial refund anticipation loans, which if approved by Beneficial, are issued on a Beneficial cashier's check. Cade's amended complaint admits as much:

> 3. The rapid refund program of the defendant, H&R Block, Inc. was in reality, a loan made to the named plaintiff by defendant, Beneficial National Bank, Inc., through the defendant, H&R Block, Inc. acting as agent for defendant, Beneficial National Bank, Inc.

(Plaintiffs' Amended Complaint at 3.) (emphasis added)

> 2. The named plaintiff is informed and believes that defendant, Beneficial National Bank, Inc. both directly, and acting through its agent, H&R Block, Inc., engages in the business of a supervised lender under the laws and regulations of the State of South Carolina.

(Pls.' Am. Compl. at 8.) (emphasis added)

Cade contracted with Beneficial, through its agent Block, to obtain a refund anticipation loan. Essentially, Cade now contends that a term of his contract (the interest rate charged) violated a variety of state and federal laws and seeks redress from both Block and Beneficial. At all times, however, Block was acting

within the scope of its agency for a disclosed principal (Beneficial).[7]

Block argues that "[a]s an agent for a disclosed principal in these transactions, Block cannot be held liable for any of the alleged violations." (Memorandum of Law in Support of H&R Block, Inc.'s Motion to Dismiss or for Summary Judgment at 5.) More precisely, as an agent for a disclosed principal, Block cannot be held liable for breach of contract. Skinner & Ruddock, Inc. v. London Guarantee and Accident Co., 239 S.C. 614, 124 S.E.2d 1789, 180 (1962). Cade, however, is not suing for breach of contract; therefore, the aforementioned rule of agency law is not controlling. However, fundamental agency principles are applicable in this case. Indeed, it is axiomatic that if Beneficial has complied with all applicable federal and state laws, Block is likewise in compliance with such laws. Accordingly, the following discussion focuses primarily on the activities of Beneficial.

I. 12 U.S.C. § 85 claim.

In his first claim, Cade contends that the $29 interest charge levied by Beneficial is "grossly in excess of the rate allowed by" Section 85 of the National Bank Act,

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[7]Cade's deposition also shows that he understood that Beneficial was the lender (principal) in the refund anticipation loan transaction. (Cade Dep. at 9, lines 15-19); (Cade Dep. at 12-13, lines 22-25, 1-2).

12 U.S.C. § 21 et seq.[8] Under 12 U.S.C. § 85, a national banking association, such as Beneficial, may charge any interest rate, so long as the rate charged complies with the usury laws of the state whether the national bank is located: "Any [national banking] association may. . .charge on any loan. . .interest at the rate allowed by the laws of the State. . .where the bank is located. . . ." Id. A national bank is "located" for § 85 purposes in the state where the bank has its charter address. Marquette Nat. Bank of Minneapolis v. First of Omaha Serv., 439 U.S. 299, 310 (1978).

Beneficial's charter address is Wilmington, Delaware. Accordingly, Beneficial is located in Delaware for § 85 purposes, and may extend credit to South Carolina residents at any interest rate allowed by Delaware law. Id. at 313 ("Since Omaha Bank and its BankAmericard program are 'located' in Nebraska, the plain language of § 85 provides that the bank may charge 'on any loan' the rate 'allowed' by the State of Nebraska.") Under Delaware law, a bank may charge "[l]oan fees, points, finders fees and other front-end and periodic charges" so long as the charges are provided for in the loan documents. Del. Code Ann. tit. 5, § 965. Beneficial's loan documents expressly provide for the collection of the $29 charge.[9] Thus, Beneficial's flat $29

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[8](Pls.'Am.Compl. at 4.)

[9]Numerous federal courts have construed the term "interest" in § 85 as encompassing "a variety of lender-imposed fees and financial requirements which are independent of numerical percentage rate."

charge on refund anticipation loans is permitted under Delaware law, and, therefore, allowed under 12 U.S.C. § 85.[10]

Moreover, the fact that Beneficial extends credit to South Carolina residents does not alter its "location" for § 85 purposes:

> If the location of the bank were to depend on the whereabouts of each credit-card transaction, the meaning of the term "located" would be so stretched as to throw into confusion the complex system of modern interstate banking. A national bank could never be certain whether its contacts with residents of foreign States were sufficient to alter its location for purposes of § 85. The mere fact that Omaha Bank has enrolled Minnesota residents, merchants, and banks in its BankAmericard program thus does not suffice to "locate" that bank in Minnesota for purposes of 12 U.S.C. § 85.

Greenwood Trust Co. v. Com. of Mass., 971 F.2d 818, 829 (1st Cir. 1992) (citing several cases that have expanded the preemptive scope of § 85), cert. denied, ___ U.S. ___, 113 S.Ct. 974 (1993).

[10]Under Delaware law a bank may charge interest at any rate or rates agreed to by the parties. Del. Code Ann. tit. 5, §§ 963-964. Thus, even if the $29 interest charge were considered a varying interest rate (since the charge remains the same regardless of the loan amount) the court would reach the same conclusion.

Marquette, at 312-13.

II. Unconscionability claim.

In his third claim, Cade asserts that the loan practices of the defendants "are unconscionable within the meaning of § 37-5-108 of the South Carolina Code." Under S.C. Code Ann. § 37-5-108 (Law. Co-op. 1989), a court can declare a consumer credit transaction unconscionable and, inter alia, award treble damages. Beneficial has moved for summary judgment as to paragraph (b) and (d) of Cade's third claim. In paragraph (8b), Cade alleges that there is a "gross disparity between the price of the services obtained and the value of the services." Paragraph (d) alleges that "[t]he charges substantially exceed the usual and customary charge for this type of consumer credit transaction."[11]

Beneficial contends that paragraph (b) and (d) of Cade's third claim are preempted by 12 U.S.C. § 85. I agree. Essentially, these paragraphs allege that Beneficial violated § 37-5-108 by charging rates of interest that are usurious under South Carolina law. As a nationally chartered bank located in Delaware, Beneficial is not subject to South Carolina laws that regulate the amount of interest a bank may charge.[12] Pursuant to 12 U.S.C. § 85, Beneficial, in extending credit to South Carolina

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[11](Pls.' Am. Comp. at 5-6.)

[12]See supra part I.

residents, may "export" the interest rate allowed by Delaware:

> In the very recent case of Fisher v. First Nat'l Bank of Chicago, 538 F.2d 1284 (7th Cir. 1976), [cert. denied, 429 U.S. 1062 (1977)], it was held that under the provisions of § 85, if a national bank in one state makes a loan in another state in which it is doing business, and if there is a differential between the maximum rate allowable in one state and the maximum rate allowable in the other state with respect to the same class of debt, the bank may charge the higher of the two rates.

We find ourselves in agreement with that holding. Fisher v. First Nat. Bank of Omaha, 548 F.2d 255, 257-58 (8th Cir. 1977).

Cade contends that the § 85 cases relied on by Beneficial (such as Marquette and Fisher) are distinguishable because they are "credit card" cases and the refund anticipation loans, by contract, involve a "face-to-face" transaction.[13] This is a distinction without a difference. Simply stated, § 85 "acts as a cowcatcher by brushing aside states' attempts to regulate 'interest rates' charged by national banks. Included within those displaced state laws are regulations regarding flat fees. .

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[13](Brief in Opposition to Defendants' Motion to Dismiss or for Summary Judgment at 13-17.)

. ." Greenwood Trust Co., 971 F.2d at 831. Additionally, the rationale for the Court's holding in Marquette--maintaining uniformity in the "complex system of modern interstate banking"--applies with equal force to the "location" of a national bank (for § 85 purposes) that makes "face-to-face loans in several states.

III. Unfair Trade Practices claim.

Cade's fourth claim alleges that the refund anticipation loan program violates the South Carolina Unfair Trade Practice Act ("UTPA"), S.C. Code Ann. § 39-5-10 to -160 (Law. Co-op. 1976).[14] The UTPA broadly proscribes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20(a) (Law. Co-op. 1976). The UTPA, however, does not apply to "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States. . . ." S.C. Code Ann. § 39-5-40(a) (Law. Co-op. 1976).

The Supreme Court of South Carolina has stated that the exemption found in § 39-5-40(a) of the UTPA "is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes." Ward v. Dick Dyer & Assocs., 304 S.C. 152, 403 S.E.2d 310, 312 (1991). "The purpose of the exemption is to insure that a business is not subject to a

[14](Pls.' Am. Compl. at 7.)

lawsuit under the Act when it does something. . .that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations." Id. (quoting with approval Skinner v. Steele, 730 S.W.2d 335, 337 (Tenn. Ct. App. 1987).

The refund anticipation loans are extensively regulated by federal lending laws and the regulations promulgated thereunder.[15] More importantly, the $29 fee charged on a refund anticipation loan is allowed by § 85 of the National Bank Act. As such, Cade's UTPA claim is based upon loan activity that is expressly permitted (and regulated) under federal law, and therefore the alleged unfair conduct falls within an exemption to the UTPA. Ward, at 312; NCNB Nat. Bank of north Carolina v. Tiller, 814 F.2d 931, 937 (4th Cir. 1987), overruled on other grounds, Busby v. Crown Supply, Inc., 896 F.2d 833, 840-41 (4th Cir. 1990) (en banc portion of opinion).[16]

IV. "Posting and Filing" claim.

In his fifth claim, Cade alleges that Beneficial, as a supervised lender under the laws of South Carolina,

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[15]A comprehensive scheme of consumer lending disclosure requirements is set forth in the Truth in Lending Act, 15 U.S.C. § 1601 et seq., as implemented by Regulation Z, 12 C.F.R. § 226.1 et seq.

[16]Additionally, to the extent the alleged UTPA violations arise out of the interest rate charged by Beneficial, Cade's claim is preempted by 12 U.S.C. § 85. See supra parts I and II.

failed to file and post its finance charge schedule as required by S.C. Code Ann. § 37-3-305) (Law. Co-op. 1989 & Cum Supp. 1992). As a result of its failure to file and post, Beneficial is allegedly prohibited from charging more than 18% interest on a refund anticipation loan by S.C. Code Ann. § 37-3-201 (Law. Co-op. 1989).[17] The relevant portion of § 37-3-201 states:

> (2) With respect to a consumer loan[18]. . .a supervised lender may contract for and receive a loan finance charge. . .not exceeding the greater of the following:
>
> (a) any rate filed and posted pursuant to § 37-3-305; or
>
> (b) eighteen percent per year on the unpaid balances of principal.

S.C. Code Ann. § 37-3-201(2) (emphasis added).

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[17](Pls.' Am. Compl. at 8.)

[18]S.C. Code Ann. § 37-3-104 (Law Co-op. Cum. Supp. 1992) defines a consumer loan as "a loan made by a person regularly engaged in the business of making loans." Block is not a lender, nor is Block "regularly engaged in the business of making loans." Therefore, Block is not in the consumer loan business, and § 37-3-201 has no application.

Initially, the court notes that Cade's fifth claim is merely another way of attempting to impose South Carolina's usury laws upon Beneficial. However, Delaware's usury laws govern the refund anticipation loans. Accordingly, insofar as these statutes, §§ 37-3-305 and 37-3-201(2), attempt to impose an interest rate limitation on a national banking association, they are preempted by § 85 of the National Bank Act. See supra parts I and II.

One of the powers expressly granted to national banks by Congress is the power to lend money. 12 U.S.C. § 24 (Seventh). Congress, with limited exceptions, has granted the Office of the Comptroller of the Currency ("OCC") supervisory and enforcement authority over the affairs of national banks. 12 U.S.C. § 481. The exercise of the OCC's authority cannot be subject to state approval or regulation because to do so would allow the states to condition or restrict a national bank's power to engage in otherwise legal lending activity. As stated by the United States Supreme Court almost 100 years ago:

> [N]ational banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduction of their affairs is absolutely void wherever such attempted exercise of authority expressly conflicts with the laws

> of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties of the performance of which they were created.

McClellan v. Chipman, 164 U.S. 347, 357 (1896) (quoting Davis v. Elmira Savings Bank, 161 U.S. 275 (1896)). Therefore, South Carolina cannot control, by its posting and filing requirements, the interest rates charged by Beneficial.

Additionally, this court notes that in Marquette, the Supreme Court recognized that federal banking laws do inhibit the states' ability to regulate interest rates. The Court, however, stated that it was within the exclusive providence of Congress, and not the courts, to alter this situation:

> Petitioners' final argument is that the "exportation" of interest rates. . .will significantly impair the ability of States to enact effective usury laws. This impairment, however, has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates. . . . But the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better

> addressed to the wisdom of Congress than to the judgment of this Court.

Id. at 318-19 (citation and footnote omitteD). In a similar manner, Cade is petitioning the wrong forum if he wishes to impose a state's usury laws on a national banking association.

V. Irrelevancy of "Branch" Argument.[19]

The bulk of Cade's brief is devoted to the repeated argument that Block operates as a "branch" of Beneficial, as that term is defined in 12 U.S.C. § 36(f).[20] Therefore, according to Cade, Beneficial--via Block--is loaning money in South Carolina and this in-state loan activity triggers the application of the South Carolina Consumer Protection Code.[21]

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[19]It is the conclusion of this court that parts I through IV of this order more than adequately address and dispose of Cade's first, third (¶¶ (b) & (d) only), fourth, and fifth claims. However, out of an abundance of caution, the court will elaborate on Cade's "branch" theory.

[20]This section provides that "[t]he term 'branch'. . .shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business. . .at which deposits are received, or checks paid, or money lent." Id.

[21](Brief in Opposition to Defendants' Motion to Dismiss or for Summary Judgment at 7.)

Cade's "branch" argument is primarily based on his understanding of First National Bank in Plant City, Florida v. Dickinson, 396 U.S. 122 (1969). In Dickinson, the Supreme Court held that an armored car owned and operated by a national banking association, at which customers could make deposits and cash checks, constituted a branch under 12 U.S.C. § 36(f). The court's holding is not surprising when the following facts are considered:

> The armored car was owned and controlled by the bank; the teller and driver-guard in the car were bank employees. The bank paid the cost of armored car operations and assumed complete responsibility for the monies, checks, and deposits during transit. . . .The truck bore the name of the bank. . . .All movements and routing of the armored car were directed by the bank.

Id. at 128.

In contrast, Block and Beneficial are nonaffiliated corporations that are completely autonomous--one is a bank, the other a tax service. Block's operations are not owned, controlled, or paid for by Beneficial. Beneficial employees do not work in Block's offices. Block's offices are not advertised as offices of Beneficial. To assert that Block is a "branch" of Beneficial merely because a customer picks up a Beneficial check in a Block office elevates form over substance.

Moreover, in the aftermath of Dickinson, courts faced with the issue of determining what constitutes a "branch" under § 36, have conducted a two-part inquiry. First, a court determines whether a national bank has established a branch under 12 U.S.C. § 36(c) by owning or renting a facility. If a branch has been established, the court then conducts a § 36(f) examination--are deposits received, checks paid, or money lent at this facility? Independent Banks Assoc. v. Marine Midland Bank, 757 F.2d 453, 456-463 (2nd Cir. 1985), cert. denied, 476 U.S. 1186 (1986); Independent Banks Assoc. v. Smith, 534 F.2d 921, 951-952 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976). Beneficial does not own, rent, or otherwise control Block's offices. Accordingly, Block's offices are not established by Beneficial under § 36(c). As such, this court does not reach the § 36(f) issue.

Cade contends that a ruling in favor of the defendants "would greatly expand Marquette. . .overrule [Dickinson]. . .and make it so that states could have no control over what interest rates were being charged their customers. . . ."[22] I disagree. Section 85 plainly provides that a national bank may charge interest "on any loan" at the rate allowed by the laws of the state whether the bank is "located." A national bank is "located" for § 85 purposes in the state whether the bank has its charter address. Marquette, 439 U.S. at 310. This order simply applies § 85 as interpreted by the Supreme Court. Further, the Dickinson case has

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[22](Brief in Opposition to Defendants' Motion to Dismiss or for Summary Judgement at 18.)

absolutely nothing do with the exportation of interest rates under § 85: "In this case we are called upon to construe. . .12 U.S.C. § 36 as it relates to the definition of a branch bank. . . ." Dickinson, at 124. Additionally, Marquette squarely rejected Cade's states' rights plea: "[T]he protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this court." Id. at 319.

Finally, it is immaterial whether Block's South Carolina offices are considered "branches" of Beneficial. As discussed above, a national bank is "located" where it has its charter address regardless of whether the bank operates branches in several states. Accordingly, even if Block's offices were considered "branches" of Beneficial, Delaware's usury laws would still apply.

THEREFORE, IT IS ORDERED that the motion of Block for summary judgment as to the first, fourth, and fifth claims of Cade is **granted.**

IT IS FURTHER ORDERED that the motion of Block for summary judgment as to paragraphs (b) and (d) of Cade's third claim is **granted.**

IT IS SO ORDERED.[23]

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[23]The court reserves ruling on Block's motion to dismiss Cade's prayer for punitive damages. The parties may submit, within ten days of the filing of this order, additional memoranda specifically addressing the punitive damages issue with respect to the remaining

WILLIAM B. TRAXLER, JR.
UNITED STATES DISTRICT JUDGE

Greenville, South Carolina
July 14, 1993.

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claims.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA FLORENCE DIVISION

C/A No. 4:92-1454-21

BENJAMIN F. CADE, individually, and on behalf of all persons similarly situated,

Plaintiffs,

v.

H & R BLOCK INCORPORATED; BENEFICIAL NATIONAL BANK,

Defendants.

O-R-D-E-R

Before the court is the renewed motion of the defendant Beneficial National Bank ("Beneficial") to dismiss or for summary judgment as to the first, fourth, fifth, and paragraphs (b) and (d) of the third claim of the plaintiffs (collectively "Cade").[1] Because matters outside

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[1]Beneficial and defendant H&R Block, Inc. have filed prior motions to dismiss Cade's action. On April 15, 1993, this court held a hearing on the motions to dismiss, but declined to rule on the

the scope of the pleadings have been considered, Beneficial's motion shall be treated as one for summary judgment. After reviewing the memoranda submitted by the parties, and after considering oral arguments, I grant the summary judgment motion of Beneficial.[2]

SUMMARY JUDGMENT STANDARD

Fed.R.Civ.P. 56(c) states, as to a party who has moved for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.

Accordingly, to prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that he is entitled to judgment as a matter of law. As to the first of these determinations, a fact is deemed "material" if

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motions at that time because Cade was granted leave to amend his complaint. At the April hearing, the court instructed the parties that any renewed motion to dismiss would be treated as a motion for summary judgment.

[2]This court finds the memoranda submitted to be thorough and to preclude the necessity of additional oral argument. Local Rule 12.08, D.S.C.

proof of its existence or nonexistence would affect the disposition of the case under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. Id. at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist which give rise to a genuine issue. Id. at 324. Accordingly, when Rule 56(e) has shifted the burden of proof to the non-movant, he must produce existence of every element essential to his action which he bears the burden of adducing at a trial on the merits.

Summary judgment serves the useful purpose of disposing of meritless claims before the court and the parties become entrenched in frivolous litigation. Donahue v. Windsor Locks Bd. of Fir Comm'rs, 834 F.2d 54, 58 (2nd Cir. 1987). Although summary judgment is an extreme remedy, the courts should not be reluctant to grant summary judgment in appropriate

cases; indeed, summary judgment is mandated where appropriate. Herman v. City of Chicago, 870 F.2d 400, 404 (7th Cir. 1989); Mieri v. Dacon, 759 F.2d 989, 998 (2nd Cir. 1985), cert. denied, 474 U.S. 829 (1985); United States v. Porter, 581 F.2d 698, 703 (8th Cir. 1978); Estate of Detwiler v. Offenbecher, 728 F.Supp. 103, 134 (S.D.N.Y. 1989); Burleson v. Illinois Farmers Ins., 725 F.Supp. 1489, 1490 (S.D. Ind. 1989). In a recent trilogy of decisions--Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986)--the Supreme Court has consistently reaffirmed its endorsement of pretrial resolution and summary disposition of baseless actions. These decisions reflect the mandatory nature of Rule 56.

In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Court held:

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'. . .Rule 56 must be construed with due regard not only for the rights of person asserting claims and

> **defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.**

Id. at 327 (citations omitted).

FACTS

The following facts are undisputed. Defendant H&R Block ("Block") is a corporation which offers tax consultation and preparation services nationwide through a network of retail offices operated by Block or its franchisees. (Affidavit of Edward B. Feinstein, ¶ 2.)[3] Beneficial is a full service national banking association with its charter address and headquarters in Wilmington, Delaware. (Affidavit of Wheeler K. Neff, ¶ 2.)[4] Beneficial has not established, nor attempted to establish, any branch banks outside of Delaware. (Id. ¶ 13.) Block

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[3]**Feinstein is the Assistant Vice President and Director of Field Automated Systems of H & R Block Tax Services, Inc. and H & R Block Eastern Tax Services, Inc. H&R Block Eastern Tax Services, Inc. is a wholly-owned subsidiary of H&R Block Tax Services, Inc. In turn, H&R Block Tax Services, Inc. is a wholly-owned subsidiary of Block.**

[4]**Neff is Senior Vice President of Beneficial. The facts refer to the latest affidavits of Neff and Feinstein both of which were filed on June 11, 1993.**

and Beneficial are separate and distinct corporations that are not affiliated. (Feinstein Aff. ¶ 7.) Moreover, Beneficial employees do not work in Block's offices, nor does Beneficial exercise any control or supervision over Block's operations. Additionally, Beneficial does not advertise in Block's offices, or pay rent in any form to Block. (Neff. Aff. ¶¶ 7-11.); (Feinstein Aff. ¶¶ 13-14-).

Block like countless other tax services across the nation, offers its customers electronic filing of federal income tax returns through its rapid refund program. In connection with its rapid refund program, Block and Beneficial entered into an agreement whereby Beneficial agreed to loan qualified Block customers the amount of a taxpayer's expected tax refund (Neff Aff. ¶ 3.), less a $29 finance charge.[5] Although Beneficial's loan documents are filled out in Block's offices, the loan application information is electronically forwarded to Beneficial's Delaware offices where Beneficial itself determines whether to make the refund anticipation loan. (Neff Aff. ¶¶ 4-6); (Feinstein Aff. ¶¶ 8-11.) If the loan is approved, a Beneficial cashier's check is issued to the customer. (Neff Aff. ¶ 6.) With regard to the refund anticipation loan program, Block is not a lender. (Feinstein Aff. ¶ 6.)[6]

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[5]The $29 finance charge is a flat fee which does not vary with size of the loan, and is expressly provided for in Beneficial's loan documents. (Neff Aff. ¶ 12.)

[6]Block charges all of its customers a tax preparation fee, and charges an additional fee for electronic filing of income tax returns. (Feinstein Aff. ¶ 15.) As a result, a customer who obtains a refund

Cade brought this action against Block and Beneficial alleging a variety of state and federal claims. At the heart of this case, however, there is but one complaint. Essentially, Cade contends that Beneficial, through Block (Beneficial's "branch office"), charges usurious rates of interest on the refund anticipation loans.

DISCUSSION

In his amended complaint, Cade asserts five claims against Block and Beneficial: (1) 12 U.S.C. § 85 claim; (2) federal Truth in Lending Act claim; (3) state law unconscionability claim; (4) state law unfair or deceptive trade practices claim; and (5) a claim that the defendants failed to comply with an assortment of state supervised lender laws. Beneficial seeks summary judgment as to the first, fourth, fifth, and portions of Cade's third claim.

I. 12 U.S.C. § 85 claim.

In his first claim, Cade contends that the $29 interest charge levied by Beneficial is "grossly in excess of the rate allowed by" Section 85 of the National Bank Act, 12 U.S.C. § 21 et seq.[7] Under 12 U.S.C. § 85, a national banking association, such as Beneficial, may charge any interest rate, so long as the rate charged complies with

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anticipation loan must pay a $29 finance charge to Beneficial and a $35 electronic processing fee to Block.

[7](Plaintiffs' Amended Complaint at 4.)

the usury laws of the state where the national bank is located: "Any [national banking] association may. . .charge on any loan. . .interest at the rate allowed by the laws of the State. . .where the bank is located. . . ." Id. A national bank is "located" for § 85 purposes in the state where the bank has its charter address. Marquette Nat. Bank of Minneapolis v. First of Omaha Serv., 439 U.S. 299, 310 (1978).

Beneficial's charter address is Wilmington, Delaware. Accordingly, Beneficial is located in Delaware for § 85 purposes, and may extend credit to South Carolina residents at any interest rate allowed by Delaware law. Id. at 313 ("Since Omaha Bank and its BankAmericard program are 'located' in Nebraska, the plain language of § 85 provides that the bank may charge 'on any loan' the rate 'allowed' by the State of Nebraska.") Under Delaware law, a bank may charge "[l]oan fees, points, finders fees and other front-end and periodic charges" so long as the charges are provided for in the loan documents. Del. Code Ann. tit. 5, § 965. Beneficial's loan documents expressly provide for the collection of the $29 charge.[8] Thus, Beneficial's flat $29 charge on refund anticipation loans is permitted under

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[8]Numerous federal courts have construed the term "interest" in § 85 as encompassing "a variety of lender-imposed fees and financial requirements which are independent of numerical percentage rate." Greenwood Trust Co. v. Com. of Mass., 971 F.2d 818, 829 (1st Cir. 1992) (citing several cases that have expanded the preemptive scope of § 85), cert. denied, ___ U.S. ___, 113 S.Ct. 974 (1993).

Delaware law, and, therefore, allowed under 12 U.S.C. § 85.[9]

Moreover, the fact that Beneficial extends credit to South Carolina residents does not alter its "location" for § 85 purposes:

> If the location of the bank were to depend on the whereabouts of each credit-card transaction, the meaning of the term "located" would be so stretched as to throw into confusion the complex system of modern interstate banking. A national bank could never be certain whether its contacts with residents of foreign States were sufficient to alter its location for purposes of § 85. The mere fact that Omaha Bank has enrolled Minnesota residents, merchants, and banks in its BankAmericard program thus does not suffice to "locate" that bank in Minnesota for purposes of 12 U.S.C. § 85.

Marquette, at 312-13. Accordingly, Beneficial's motion for summary judgment as to Cade's first claim shall be granted.

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[9]Under Delaware law a bank may charge interest at any rate or rates agreed to by the parties. Del. Code Ann. tit. 5, §§ 963-964. Thus, even if the $29 interest charge were considered a varying interest rate (since the charge remains the same regardless of the loan amount) the court would reach the same conclusion.

II. Unconscionability claim.

In his third claim, Cade asserts that the loan practices of the defendants "are unconscionable within the meaning of § 37-5-108 of the South Carolina Code." Under S.C. Code Ann. § 37-5-108 (Law. Co-op. 1989), a court can declare a consumer credit transaction unconscionable and, inter alia, award treble damages. Beneficial has moved for summary judgment as to paragraph (b) and (d) of Cade's third claim. In paragraph (8b), Cade alleges that there is a "gross disparity between the price of the services obtained and the value of the services." Paragraph (d) alleges that "[t]he charges substantially exceed the usual and customary charge for this type of consumer credit transaction."[10]

Beneficial contends that paragraph (b) and (d) of Cade's third claim are preempted by 12 U.S.C. § 85. I agree. Essentially, these paragraphs allege that Beneficial violated § 37-5-108 by charging rates of interest that are usurious under South Carolina law. As a nationally chartered bank located in Delaware, Beneficial is not subject to South Carolina laws that regulate the amount of interest a bank may charge.[11] Pursuant to 12 U.S.C. § 85, Beneficial, in extending credit to South Carolina residents, may "export" the interest rate allowed by Delaware:

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[10](Pls.' Am. Comp. at 5-6.)

[11]See supra part I.

> In the very recent case of Fisher v. First Nat'l Bank of Chicago, 538 F.2d 1284 (7th Cir. 1976), [cert. denied, 429 U.S. 1062 (1977)], it was held that under the provisions of § 85, if a national bank in one state makes a loan in another state in which it is doing business, and if there is a differential between the maximum rate allowable in one state and the maximum rate allowable in the other state with respect to the same class of debt, the bank may charge the higher of the two rates.

We find ourselves in agreement with that holding. Fisher v. First Nat. Bank of Omaha, 548 F.2d 255, 257-58 (8th Cir. 1977).

Cade contends that the § 85 cases relied on by Beneficial (such as Marquette and Fisher) are distinguishable because they are "credit card" cases and the refund anticipation loans, by contract, involve a "face-to-face" transaction.[12] This is a distinction without a difference. Simply stated, § 85 "acts as a cowcatcher by brushing aside states' attempts to regulate 'interest rates' charged by national banks. Included within those displaced state laws are regulations regarding flat fees. . . ." Greenwood Trust Co., 971 F.2d at 831. Additionally, the rationale for the Court's holding in Marquette--maintaining uniformity in the "complex

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[12](Brief in Opposition to Defendants' Motion to Dismiss or for Summary Judgment at 13-17.)

system of modern interstate banking"--applies with equal force to the "location" of a national bank (for § 85 purposes) that makes "face-to-face loans in several states.

III. Unfair Trade Practices claim.

Cade's fourth claim alleges that the refund anticipation loan program violates the South Carolina Unfair Trade Practice Act ("UTPA"), S.C. Code Ann. § 39-5-10 to -160 (Law. Co-op. 1976).[13] The UTPA broadly proscribes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20(a) (Law. Co-op. 1976). The UTPA, however, does not apply to "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States. . . ." S.C. Code Ann. § 39-5-40(a) (Law. Co-op. 1976).

The Supreme Court of South Carolina has stated that the exemption found in § 39-5-40(a) of the UTPA "is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes." Ward v. Dick Dyer & Assocs., 304 S.C. 152, 403 S.E.2d 310, 312 (1991). "The purpose of the exemption is to insure that a business is not subject to a lawsuit under the Act when it does something. . .that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations." Id. (quoting

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[13](Pls.' Am. Compl. at 7.)

with approval Skinner v. Steele, 730 S.W.2d 335, 337 (Tenn. Ct. App. 1987).

The refund anticipation loans are extensively regulated by federal lending laws and the regulations promulgated thereunder.[14] More importantly, the $29 fee charged on a refund anticipation loan is allowed by § 85 of the National Bank Act. As such, Cade's UTPA claim is based upon loan activity that is expressly permitted (and regulated) under federal law, and therefore the alleged unfair conduct falls within an exemption to the UTPA. Ward, at 312; NCNB Nat. Bank of north Carolina v. Tiller, 814 F.2d 931, 937 (4th Cir. 1987), overruled on other grounds, Busby v. Crown Supply, Inc., 896 F.2d 833, 840-41 (4th Cir. 1990) (en banc portion of opinion).[15]

IV. "Posting and Filing" claim.

In his fifth claim, Cade alleges that Beneficial, as a supervised lender under the laws of South Carolina, failed to file and post its finance charge schedule as required by S.C. Code Ann. § 37-3-305) (Law. Co-op. 1989 & Cum Supp. 1992). As a result of its failure to file

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[14]A comprehensive scheme of consumer lending disclosure requirements is set forth in the Truth in Lending Act, 15 U.S.C. § 1601 et seq., as implemented by Regulation Z, 12 C.F.R. § 226.1 et seq.

[15]Additionally, to the extent the alleged UTPA violations arise out of the interest rate charged by Beneficial, Cade's claim is preempted by 12 U.S.C. § 85. See supra parts I and II.

and post, Beneficial is allegedly prohibited from charging more than 18% interest on a refund anticipation loan by S.C. Code Ann. § 37-3-201 (Law. Co-op. 1989).[16] The relevant portion of § 37-3-201 states:

> (2) With respect to a consumer loan. . .a supervised lender may contract for and receive a loan finance charge. . .not exceeding the greater of the following:
>
> (a) any rate filed and posted pursuant to § 37-3-305; or
>
> (b) eighteen percent per year on the unpaid balances of principal.

Id.

Initially, the court notes that Cade's fifth claim is merely another way of attempting to impose South Carolina's usury laws upon Beneficial. However, Delaware's usury laws govern the refund anticipation loans. Accordingly, insofar as these statutes, §§ 37-3-305 and 37-3-201(2), attempt to impose an interest rate limitation on a national banking association, they are preempted by § 85 of the National Bank Act. See supra parts I and II.

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[16](Pls.' Am. Compl. at 8.)

One of the powers expressly granted to national banks by Congress is the power to lend money. 12 U.S.C. § 24 (Seventh). Congress, with limited exceptions, has granted the Office of the Comptroller of the Currency ("OCC") supervisory and enforcement authority over the affairs of national banks. 12 U.S.C. § 481. The exercise of the OCC's authority cannot be subject to state approval or regulation because to do so would allow the states to condition or restrict a national bank's power to engage in otherwise legal lending activity. As stated by the United States Supreme Court almost 100 years ago:

> [N]ational banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduction of their affairs is absolutely void wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties of the performance of which they were created.

McClellan v. Chipman, 164 U.S. 347, 357 (1896) (quoting Davis v. Elmira Savings Bank, 161 U.S. 275 (1896)). Therefore, South Carolina cannot control, by its posting

and filing requirements, the interest rates charged by Beneficial.

Finally, this court notes that in Marquette, the Supreme Court recognized that federal banking laws do inhibit the states' ability to regulate interest rates. The Court, however, stated that it was within the exclusive providence of Congress, and not the courts, to alter this situation:

> Petitioners' final argument is that the "exportation" of interest rates. . .will significantly impair the ability of States to enact effective usury laws. This impairment, however, has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates. . . . But the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.

Id. at 318-19 (citation and footnote omitted). In a similar manner, Cade is petitioning the wrong forum if he wishes to impose a state's usury laws on a national banking association.

THEREFORE, IT IS ORDERED that the motion of Beneficial for summary judgment as to the first, fourth, and fifth claims of Cade is **granted.**

IT IS FURTHER ORDERED that the motion of Beneficial for summary judgment as to paragraphs (b) and (d) of Cade's third claim is **granted.**

IT IS SO ORDERED.[17]

WILLIAM B. TRAXLER, JR.
UNITED STATES DISTRICT JUDGE

Greenville, South Carolina
July 14, 1993.

[17]The court reserves ruling on Block's motion to dismiss Cade's prayer for punitive damages. The parties may submit, within ten days of the filing of this order, additional memoranda specifically addressing the punitive damages issue with respect to the remaining claims.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA FLORENCE DIVISION

C/A No. 4:92-1454-21

BENJAMIN F. CADE, individually, and on behalf of all persons similarly situated,

Plaintiffs,

v.

H & R BLOCK INCORPORATED; BENEFICIAL NATIONAL BANK,

Defendants.

O-R-D-E-R

Before the court is the motion of the plaintiffs (collectively "Cade") for reconsideration of this court's previous orders granting summary judgment to the defendants.[1] Cade asks this court to reconsider the

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[1]Specifically, the court issued two orders entered July 16, 1993, in which the defendants were granted summary judgment as to the first, fourth, and fifth claims of Cade, and paragraphs (b) and (d) of his third claim.

merits of his first claim which asserts a violation of 12 U.S.C. § 85. Cade contends that this court's ruling "was based upon an unintentional misapplication of Delaware law." Specifically, Cade argues that this court misapplied Del. Code Ann. tit. 5 § 963 (1992).

This court's holding was not based upon § 963. Instead, this court held that the $29 interest fee which Beneficial charges its borrowers is permitted under Delaware law pursuant to Del. Code Ann. tit. 5, § 965 (1992), and therefore is allowed under 12 U.S.C. § 85. See (Beneficial Order at 7.); (Block Order at 8-9).

Section 965 provides in relevant part as follows:

> In addition to or in lieu of periodic interest at a periodic percentage rate or rates permitted by §§ 963 and 964. . .a bank may charge and collect, as interest, in respect of a loan:
>
> (1) Loan fees, points, finders fees and other front-end and periodic charges; provided, however, that in the case of a loan to an individual borrower, no such front end or periodic charge may be charged and collected unless the agreement governing. . .the loan so provides;

Id. (emphasis added). It is undisputed that Beneficial's loan documents expressly provide for the collection of the $29 charge. Therefore, § 965 plainly permits Beneficial

to charge and collect, as interest, $29 on each refund anticipation loan. This type of interest charge falls within the definition of "interest" for purposes of 12 U.S.C. § 85. See Greenwood Trust Co. v. Com. of Mass., 971 F.2d 819,829 (1st Cir. 1992) (citing with approval several courts which have construed the term "interest" in § 85 as encompassing "a variety of lender-imposed fees and financial requirements which are independent of a numerical percentage rate"), cert. denied, ___ U.S. ___, 113 S.Ct. 974 91993).

THEREFORE, IT IS ORDERED that the motion of Cade for reconsideration of this court's previous orders granting summary judgment in favor of the defendant is **denied.**

IT IS SO ORDERED.

WILLIAM B. TRAXLER, JR.
UNITED STATES DISTRICT JUDGE

Greenville, South Carolina
August 17, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA FLORENCE DIVISION

C/A No. 4:92-1454-21

BENJAMIN F. CADE, individually, and on behalf of all persons similarly situated,

Plaintiffs,

v.

H & R BLOCK INCORPORATED; BENEFICIAL NATIONAL BANK,

Defendants.

O-R-D-E-R

I. INTRODUCTION

Presently before the court are Plaintiff Benjamin Cade's ("Cade") two claims[1] against Defendants H & R

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[1]The court has previously granted summary judgment in favor of the Defendants with respect to Counts I, III(b), (d), IV, and V. See Cade v. H & R Block, Inc., C/A No. 4:92-1454-21 (July 16, 1993). Thus, the only claims currently before the court are Counts II and Counts III(a), (c), and (e)-(g) of the Amended Complaint.

Block ("Block") and Beneficial National Bank ("Beneficial") for: (1) violation of the Trust in Lending Act ("TILA") (codified at scattered sections of Title 15); and (2) unconscionability pursuant to S.C. Code Ann. § 37-5-108 (Law. Co-op. 1976). Block and Beneficial have moved the court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure with respect to these two claims. Concluding that there are no issues of material fact and that Block and Beneficial are entitled to judgment as a matter of law, the court **GRANTS** the Defendants' motion for summary judgment.[2]

II. THE FACTS

The material facts have been previously recited in prior orders and consequently will not be repeated at length here. At all material times, Cade electronically filed his federal income tax return through Block, which charges a filing fee of $35.00. Along with the electronic filing, Cade also sought and ultimately obtained a refund anticipation loan (RAL) under which he received from Beneficial a loan in the anticipated amount of his tax refund. Beneficial charges a flat fee of $29.00 for this front-end loan.

In order to obtain the RAL, Cade was required to complete a loan application and certification form provided by Beneficial. This application authorizes

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[2]The parties have thoroughly briefed the issues, and therefore oral argument is unnecessary. See District of South Carolina Local Rules, Rule 12.08.

Beneficial to establish an account in Cade's name and to have the tax refund deposited into that account. By signing the application and certification form, Cade transferred to Beneficial an interest in the proceeds of the tax refund to the extent of the RAL. Subsequent to completing the application and certification form, Cade then simultaneously received: (1) the truth-in-lending disclosures stating the amount financed, the finance charges, and the annual percentage rate ("APR") charged by Beneficial; (2) the loan agreement, which provided that Cade would pay Beneficial the amount of the loan "on demand," and that a security interest in the tax refund would be created in favor of Beneficial; and (3) a check made payable to him, which represented the loan proceeds. Cade's endorsing the check demonstrated his asset to the terms of the loan and obligated him to repay it.

Cade now asserts in Count II of his Amended Complaint that Beneficial's calculation of the APR is so "grossly understated" that it amounts to a violation of TILA. Cade also contends that his not being furnished with the truth-in-lending disclosures until he received the loan agreement and check likewise violates the TILA because it is untimely. In the remaining allegations of Count III, Cade claims that these and other practices constitute unconscionable behavior in violation of state law. The court addresses these contentions in turn after stating the procedural standard.

III. DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Thus, the Rule requires that the court enter judgment against a party who, "after adequate time for. . .discovery fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The party seeking summary judgment shoulders the initial burden of demonstrating that there is no genuine issue of material fact. Id. at 323. Accordingly, to prevail on a summary judgment motion, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that he is entitled to judgment as a matter of law. A fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence so offered is such that a reasonable jury might return a verdict for the non-movant. Id. at 257. In determining whether a genuine issue has been raised, the court must construe all inference against the movant and in favor of the non-movant. Id. at 257-58. On a summary judgment motion, the court "cannot try issues of fact; it can only determine whether there are issues to

be tried." Heyman v. Commerce & Indus. Inc., 524 F.2d 1317, 1319-20 (2d Cir. 1975). The non-movant, however, "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985). Rather, if the evidence "is so one-sided that one party must prevail as a matter of law," the court must enter summary judgment. Anderson, 477 U.S. at 251-252. Hence, the non-movant, to survive the motion, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist that give rise to a genuine issue. Celotex Corp., 477 U.S. at 324.

Summary judgment serves the useful purpose of disposing of meretricious, pretended claims before the court and parties become "entrenched in a frivolous and costly trial." Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 58 (2d Cir. 1987). The courts, therefore, should not be reluctant to grant summary judgment in appropriate cases; indeed, summary judgment is mandated where appropriate. See, e.g., Herman v. City of Chicago, 870 F.2d 500, 404 (7th Cir. 1989); Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir.), cert. denied, 474 U.S. 829 (1985); United States v. Porter, 581 F.2d 698, 703 (8th Cir. 1978); Estate of Detwiler v. Offenbecher, 728 F. Supp. 103, 104 (S.D.N.Y. 1989); Burleson v. Illinois Farmers Ins. Co., 725 F. Supp. 1489, 1490 (S.D. Ind. 1989). In a recent trilogy of decisions--Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty lobby,m Inc., 477 U.S. 242 (1986), and Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S.

574 (1986)--the Supreme Court has consistently reaffirmed its endorsement of pretrial resolution and summary disposition. These decisions reflect the mandatory nature of Rule 56. In Celotex Corp., the Court stated:

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'...Rule 56 must be construed with due regard not only for the rights of person asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of person opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual bases.

Celotex Corp., 477 U.S. 317 (1986) (citations omitted and internal quotation marks omitted). The law therefore compels that summary judgment be entered if the complainant's action cannot be maintained. Against this procedure standard, the court examines the merits.

A. Count II[3]

Pursuant to its grant of rule-making authority, see 15 U.S.C.A. § 1604 (West 1982), the Federal Reserve Board ("Board") has promulgated Regulation Z, 12 C.F.R. s 226 (1993) to implement the TILA. Regarding the Board and its regulations, the TILA provides:

> No provision of this section. . .imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

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[3]The court notes that the allegations in Count II are vague and do not state that they are alleged pursuant to a specific section of the TILA, nor do they allege what section of the TILA the Defendants purportedly violated.

15 U.S.C.A. § 1640(f) (West 1982). The TILA via § 1640(f) therefore insulates a lender or creditor from liability provided he acted in good faith and in conformity with Regulation Z. See Warren v. Creditthrift, Inc., 599 F.2d 829, 831 (7th Cir. 1979) (holding that no liability attaches for violations of the TILA provided the "defendants. . .act in good faith conformity with Regulation Z"). Accordingly, if Block and Beneficial demonstrate their compliance with Regulation Z, Cade cannot prevail on Count II as a matter of law.

1. Calculation of the APR

Cade's first contention is that Beneficial inaccurately calculates the APR and that the actual APR is far greater than as represented. The threshold issue to be resolved is whether this loan is a demand loan. Here, the loan agreement provided that "[b]y endorsing this check above, you promise to pay us on demand the amount set forth in the 'Total of Payments' schedule on the attached check stub." (emphasis added). There is no other language in the agreement stating that this loan is anything but payable on demand. By its plain terms therefore, the instrument clearly stated that it was payable on demand. Accordingly, the court concludes that this is a demand loan.

The requisite disclosures with respect to a demand loan provide:

> If an obligation is payable on demand, the creditor shall make the

> disclosures based on an assumed maturity of 1 year. If an alternate maturity date is stated in the legal obligation between the parties, the disclosures shall be based on that date.

12 C.F.R. § 226.17(C)(5) (1993). Here, the APR was calculated in precisely this fashion--i.e.--as though it were due and payable one year from the date on which it was made; and Cade candidly admits this to be true. Because Beneficial has determined the APR in complete compliance with the applicable regulations, and Cade concedes this point, the Defendants are entitled to summary judgment with respect to this contention because there are no issues of material fact and the movant is entitled to judgment as a matter of law. See Moore v. Tower Loan of Mississippi, 487 F. Supp. 352, 356 (N.D. Miss. 1980) (holding that if APR is calculated according to regulations, such calculation is proper and thus a defendant who complied with the regulations was entitled to summary judgment); see also Fed. R. Civ. P. 56(c).[4]

2. Timeliness of Disclosures

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[4]Although Cade had not argued the point, the court also concludes that Cade cannot avail himself of the "alternate maturity date" exception in 12 C.F.R. s 226.17(c)(5) because there is no alternate maturity date provided in the terms of the loan agreement. See 12 C.F.R. Pt. 226, Supp. I, cmt. 17(c)(1)-17; 12 C.F.R. Pt. 226, Supp. I, cmt. 17(c)(5)-1. Here, there is nothing in the terms of the loan agreement providing for an alternate maturity date, and such a date is not established by customer or practice. See id.

Cade's next contention is that Beneficial did not timely make the requisite truth-in-lending disclosures prior to consummation of the loan as required by 12 C.F.R. S 226.17(b). The truth-in-lending disclosures were made when Cade was presented with the loan agreement and the check. Cade apparently asserts, however, that the disclosures should have been revealed prior to this time, presumably when he completed the application and certification form. Conversely, the Defendants contend that the disclosures were timely when made because it was not until that time that the loan was actually consummated. Regulation Z provides that a loan is consummated at "the time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2(a)(13)(1993). Thus, consummation is characterized as occurring "when the lender and borrower sign a contract obligating them, respectively, to lend and to borrow the funds." Murphy v. Empire of America, FSA, 746 F.2d 931, 934 (2d Cir. 1984). Accordingly not until the parties actually sign the loan agreement, not any preliminary instruments, does consummation occur.

The case law rejects Cade's interpretation. For example, in Waters v. Weyerhaeuser Mortgage Co., 582 F.2d 503 (9th Cir. 1978), the debtors, who sought a home loan, were not presented with the truth-in-lending disclosures until closing, at which time they also received the deed of trust and the deed of trust note. Id. at 504. The debtors contended that disclosures made at the closing were untimely under the TILA, id., but the Ninth Circuit squarely rejected this contention, id. at 505. The

court observed that it had "found no case which has held that disclosure at the time of closing is untimely," and after surveying the history of Regulation Z, concluded "that disclosure at time of closing satisfies the requirement of [the TILA]." Id. See also Bissett v. Colonial Mortgage Corp., 477 F.2d 1245, 1246-48 (D.D.Cir. 1973) (holding that truth-in-lending disclosures need not be made until closing); Puckett v. Georgia Homes, Inc., 369 F. Supp. 614, 618 (D.S.C. 1974) (holding that truth-in-lending disclosures made January 16, the date on which the contract was executed, were made "at the appropriate time," and were not required to be disclosed on January 12, the date that the credit application was completed).

The decisional law therefore compels this court to hold that Beneficial's truth-in-lending disclosures were timely when made.[5] Even if the law did not compel this result, common sense would. Prior to the date of disclosure, Cade had merely completed an application and certification form. This instrument, while detailing the events that would occur if the loan were approved, did not obligate Beneficial to extend the loan or Cade to accept it. Rather, this application merely determined whether a RAL would be available to Cade. In short,

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[5]In his brief, Cade invites the court to sustain the argument of a consumer group that the disclosures are untimely. See Cade's Response to Defendants' Motion for Summary Judgment, at 6-7. While there may be some merit to this argument, this court is compelled to follow the law, not the policy considerations of a special interest group. Cade's contentions are best addressed to Congress.

this application and certification was not a consummation of the contract, but merely a preliminary instrument, because id did not compel the parties to make or accept the loan. This court therefore holds that any contention of untimeliness with respect to truth-in-lending disclosures fails. Both prongs of Count II of the Amended Complaint having failed, the court grants the Defendants' motion for summary judgment with respect to this court.

B. Count III

The court has previously granted summary judgement in favor of the Defendants with respect to paragraph (b) and (d) of Count III. The Defendants have now moved for summary judgment with respect to the remaining paragraphs. Count III generally alleges that the Defendants' loan practices are unconscionable under South Carolina law pursuant to S.C. Code Ann. s 37-5-108 (Law. Co-op. 1976), and then proceeds to describe this alleged unconscionability in separate paragraphs. The court addresses these remaining paragraphs seriatim.

1. Paragraph (a)

Paragraph (a) avers that the Defendant's conduct is unconscionable because Defendants knew that there was no reasonable probability that Cade would be able to repay his loan. Although Cade not does state pursuant to what subsection of section 37-5-108 this allegation is brought, the court presumes it is brought under subsection 37-5-108(4)(a), which provides that in assessing

unconscionability in a consumer credit transaction, the court must consider the "belief by the ...lender at the time a transaction is entered into that there is no reasonable probability of payment in full of the obligation by the...debtor[.]"

This court has found no reported decision by the Fourth Circuit Court of appeals, the District of South Carolina, nor the South Carolina courts construing this section. Thus, no precedent compels a conclusion. The court concludes, however, that Defendants are entitled to summary judgment with respect to this paragraph because Cade has not met his procedural burden of presenting any evidence to prove this claim. Rather, the record reveals just the opposite because Cade has repaid all of his loans; moreover, that Beneficial would lend sums of money on the premise that it would not be repaid strains credulity. Therefore, the Defendants are entitled to summary judgment with respect to Count III(a).

2. Paragraph (c)

Cade alleges in paragraph (c) that the Defendants have taken advantage of him because of mental or physical impairment. Again, Cade does not state that he prosecutes this claim pursuant to a specific subsection, but the court presumes that it is brought under subsection 37-5-108(4)(e), which provides that a lender's knowingly taking advantage of a debtor's "physical or mental infirmities, ignorance, illiteracy, inability to understand the language of the agreement, or similar factors" is a consideration in assessing unconscionability.

To prevail under this subsection therefore, Cade must produce evidence that he is physically or mentally impaired and that the Defendants knowingly took advantage of this fact.

The record belies Cade's assertion of any infirmity. There is no evidence before the court tending to demonstrate that Cade is physically or mentally impaired. Rather, Cade unequivocally stated in his deposition that he did not suffer from any physical or mental infirmities. Also, the record reveals that Cade has received types of training while in the armed forces and while working in a hospital. Cade has not offered any evidence that he is ignorant, illiterate, or unable to comprehend the terms of the loan agreement. Additionally, there is no showing of any overreaching on behalf of Block or Beneficial. Having done nothing to refute the facts showing that Cade is physically and mentally sound, summary judgment will be entered in favor of Defendants with respect to Count III(c).

3. <u>Paragraph (e)</u>

Paragraph (e) avers that the Defendant did not timely disclose the terms, conditions, and APR of the loan and that when disclosure was made, the APR was grossly understated, all in violation of state law. These are the same allegations averred in Count III. Again, Cade does not state the case or statute that Defendants' behavior allegedly violates, but the court presumes that Cade refers to section 37-3-301, which is the state counterpart of the federal TILA. Section 37-3-301 states that "[a]

person upon whom the Federal Truth in Lending Act imposes duties or obligations shall make or give to the consumer the disclosures, information and notices required of him by that act and in all respects comply with that act." S.C. Code Ann. § 37-3-301. Accordingly, the Defendants are entitled to summary judgment with respect to Count III (e).

4. Paragraph (f)

In paragraph (f), Cade alleges that the Defendants did not offer a right of prepayment of the loan, yet the received prepayment without rebating any interest that he paid. Cade contends that this violates S.C. Code Ann. section 37-3-209 (Law. Co-op. 1976), which provides that subject to certain conditions, a "debtor may prepay in full the unpaid balance of a consumer loan, refinancing, or consolidation at any time without penalty."

In its prior orders, this court held that 12 U.S.C.A. § 85 (West 1989), permits Beneficial to charge whatever interest rate on a loan is permitted by Delaware law and that South Carolina law is preempted to the extent that it is contrary. Thus, this court has previously held, with respect to when the loan is entered, that § 85 preempts any purported limitation that South Carolina law might seek to impose on the interest rate. To hold that South Carolina law would compel a rebate on final payment of the loan is inherently inconsistent. The preemptive effect of § 85 remains constant and does not fluctuate with respect to timing. Therefore, because § 85

preempts this claim, Defendants are entitled to summary judgment with respect to Count III(f).

5. Paragraph (g)

Paragraph (g), like its predecessors, does not state pursuant to what subsection of section 37-5-108 it is brought, but alleges that Cade received no benefit from paying the $35.00 fee to have his return electronically filed. Subsection 37-5-108(4)(b) provides that in determining unconscionability in a consumer credit transaction, the court shall consider "in the case of consumer credit sale, consumer lease, or consumer rental-purchase agreement, knowledge by the seller or lessor at the time of the sale or lease of the inability of the consumer to receive substantial benefits from the property or services sold or leased[.]" By its express terms, this subsection only applies to credit sale, leases or rental-purchase agreements. Here, by contract, the transaction is a loan. Hence, subsection 37-5-108(4)(b) does not even apply to this action. Cade's claim therefore does not come within the purview of the statute.

Even if Cade's claim could be characterized as coming within the ambit of this subsection, the claim still fails because the evidence demonstrates that Cade did receive a benefit from the transaction: "Cade desired the rapid refund, and continually sought them, so that he could subsidize a trip to a convention and to put a larger engine in his car. Apart from these concrete examples of a substantial benefit, the court observes that the purpose of a rapid refund is that the taxpayer may have fairly

immediate use and enjoyment of his money. Accordingly, Defendants are entitled to summary judgment with respect to paragraph (g) of Count III.

IV. CONCLUSION

Summary judgment is proper in this action because the material facts are not disputed and the Defendants are entitled to judgment in their favor as a matter of law. Cade has not proffered any evidence tending to demonstrate that he could prevail on either of the remaining two counts of his complaint. With respect to Count II, the court holds that the APR was calculated in accordance with Regulation Z and that the truth-in-lending disclosures were timely made; hence, Defendants are entitled to summary judgment on this count. Regarding Count III, Cade has failed to elicit any proof of substantiate his numerous allegations. Even if Cade had offered such evidence, paragraphs (e), (f), and (g) fail as a matter of law. The Defendants are entitled to summary judgment with respect to the remaining paragraphs of Count III. Therefore, the Defendants' motion for summary judgment is GRANTED.
IT IS SO ORDERED.

WILLIAM B. TRAXLER, JR.
UNITED STATES DISTRICT JUDGE

Greenville, South Carolina
November 4, 1993.

Supreme Court, U.S.
FILED
MAY 3 1995
OFFICE OF THE CLERK

NO. 94-1632

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BENJAMIN F. CADES
Petitioner

v.

H & R BLOCK, INCORPORATED
and BENEFICIAL NATIONAL BANK
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to revisit its unanimous holding in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), that a national bank is "located" in its home state, notwithstanding loan-related activities conducted in other states, and that the bank may therefore charge whatever interest is permitted by the law of its home state pursuant to section 85 of the National Bank Act, 12 U.S.C. § 85?

2. Should this Court grant certiorari to review the fact-specific determination by the Court of Appeals and the District Court that Petitioner was not contractually bound on a credit transaction at the time that he was given his disclosures under the Truth in Lending Act?

3. Should this Court grant certiorari to review the fact-specific determination by the Court of Appeals and the District Court that the loan made to Petitioner was a demand loan for purposes of calculating the annual percentage rate under the Truth in Lending Act?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were as follows:

(a) The Plaintiff was Benjamin F. Cades, an individual.[1] He brought suit on his own behalf and purportedly on behalf of a class of similarly situated persons. He is the Petitioner before this Court.

(b) H & R Block, Inc., a Defendant below and a Respondent before this Court, is a corporation with no parent companies and no United States subsidiaries (except wholly owned subsidiaries). Some shares of certain foreign subsidiaries are owned by employees or legal representatives of H & R Block, Inc., or its wholly owned subsidiaries, in order to comply with corporation statutes and regulations of the foreign countries in which they operate.

(c) Beneficial National Bank, the other Defendant below and the other Respondent before this Court, is a wholly owned subsidiary of Beneficial Corporation. Beneficial Corporation has a partially owned subsidiary, Flashtax, Inc. Beneficial Corporation has no parent company and no other subsidiaries (except wholly owned subsidiaries). Beneficial National Bank has no subsidiaries (except wholly owned subsidiaries).

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[1] Mr. Cades' name was incorrectly spelled as "Cade" in his pleadings, and the caption in the District Court therefore reflected that misspelling. In the Court of Appeals, the caption was corrected to reflect the proper spelling.

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NO. 94-1632

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BENJAMIN F. CADES
Petitioner

v.

H & R BLOCK, INCORPORATED
and BENEFICIAL NATIONAL BANK
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioners' citation to the opinion of the United States Court of Appeals for the Fourth Circuit is incorrect. The opinion appears at 43 F.3d 869 (4th Cir. 1994).

The opinions of the United States District Court for the District of South Carolina have not been officially published, but appear at 1993 U.S. Dist. LEXIS 19038-19043 (D.S.C. 1993).

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are set out in the appendix hereto:

Section 81 of the National Bank Act, 12 U.S.C § 81 (Rev. Stat. § 5190)

Section 85 of the National Bank Act, 12 U.S.C § 85 (Rev. Stat. § 5197)

Section 111 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338, 2365 (codified at 12 U.S.C. § 1811 note)

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Del. Code Ann. tit. 5, § 965(1)

STATEMENT OF THE CASE

I. HISTORY OF PROCEEDINGS

This action relates to a consumer financial service known as tax refund anticipation loans ("RAL's"), under which taxpayers who expect to receive federal income tax refunds may gain access to their funds on an expedited basis by obtaining demand loans in the anticipated amount of their tax refunds. In 1991 and 1992, Petitioner Benjamin F. Cades ("Cades") obtained RAL's from Respondent Beneficial National Bank ("Beneficial") in connection with the filing of his federal income tax returns through the services of Respondent H & R Block, Inc. ("Block"), in South Carolina. He now claims, purportedly on behalf of a class of similarly situated borrowers,[2] that the RAL program is in

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[2] No class was ever certified by the District Court.

violation of the usury requirements of the National Bank Act and the disclosure requirements of the Truth in Lending Act.

Cades originally brought suit against Beneficial and Block in South Carolina state court, and Respondents removed the case to the United States District Court for the District of South Carolina. Following the denial of his motion to remand, Cades filed an Amended Complaint, asserting violations of section 85 of the National Bank Act, 12 U.S.C. § 85, which limits the interest that may be charged on a loan by a national bank, and of provisions of the Truth in Lending Act, 15 U.S.C. §§ 1601-1667e, regulating the timing and content of disclosures to be made in consumer loans. Acting on subsequently filed motions for summary judgment, the District Court held that the RAL program was in full compliance with these laws, and it therefore granted summary judgment in favor of Respondents.[3]

Cades appealed to the United States Court of Appeals for the Fourth Circuit, which unanimously affirmed.[4] Addressing first Cades' claim for usury, the Court of Appeals noted that Cades relied on section 85 of the National Bank Act, which authorizes a national bank such as Beneficial to charge whatever interest is permitted by the law of the state where the bank is "located." 12 U.S.C. § 85. Applying this Court's opinion in *Marquette*

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[3] The District Court also granted summary judgment to Beneficial and Block on the claims asserted by Cades under South Carolina state law.

[4] The Court of Appeals held that irrespective of any issue of the District Court's jurisdiction over Cades' original Complaint, there was indisputably federal jurisdiction over his Amended Complaint, which expressly asserted claims arising under federal statutes. *Cades v. H & R Block, Inc.*, 43 F.3d 869, 873 (4th Cir. 1994) (Pet. 6a-7a) (citing *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 16 (1951)).

National Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978), that a national bank is "located" in the state of its charter address for purposes of section 85, the Court of Appeals held that Beneficial is "located" in Delaware and can therefore charge on its RAL's the interest permitted by Delaware law. Since the law of Delaware authorizes the finance charge assessed by Beneficial in this case, the Court of Appeals determined that the District Court had properly granted summary judgment against Cades on the usury claim. *Cades v. H & R Block, Inc.*, 43 F.3d 869, 873-74 (4th Cir. 1994) (Pet. 7a-11a).

The Court of Appeals then turned to Cades' two claims under the Truth in Lending Act ("TILA"). Cades first challenged Beneficial's practice of treating RAL's as demand loans for the purpose of calculating the annual percentage rate ("APR") disclosed to Cades and other RAL customers. The Court of Appeals carefully examined the wording of the loan documents between Beneficial and Cades and determined that the RAL's *were* in fact demand loans and, thus, were properly treated as such for purposes of calculating the APR. Therefore, the APR was correctly calculated. *Id.* at 874-75 (Pet. 11a-13a).

Cades' second claim under TILA asserted that the required disclosures should have been provided to him at the time that he applied for a RAL, rather than at the time that the check for the loan proceeds was made available to him. Applying a regulation of the Federal Reserve Board that permits disclosures to be given at any time before the consumer becomes contractually obligated on a credit transaction, the Court of Appeals again scrutinized the wording of the application and other loan documents signed by Cades. The Court of Appeals concluded that Cades was *not* contractually obligated on a credit transaction by signing the loan application form and that he did not become so bound until he

signed a formal Loan Agreement on the loan check itself. Accordingly, the Court of Appeals concluded that the truth-in-lending disclosures were provided on a timely basis. *Id.* at 875-76 (Pet. 13a-15a).

Since the District Court had properly granted summary judgment in favor of Beneficial and Block on each of these claims, the Court of Appeals affirmed the District Court's judgment in full.[5] Cades has petitioned for certiorari to review the judgment of the Court of Appeals on each of these three claims. In opposition, Respondents submit that certiorari is clearly not warranted. Cades' usury claim involves nothing more than a routine application of this Court's decision in *Marquette*, and his claims under the Truth in Lending Act turn not on any question of interpreting the statute and implementing regulations, but rather on the construction of the particular loan documents signed between Cades and Beneficial. Notwithstanding Cades' contentions, there is no conflict among the Courts of Appeals on any of the issues raised in his petition; to the contrary, the law in this area is well settled. Cades has not identified any novel or significant issue deserving review by this Court. Accordingly, certiorari should be denied.

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[5] The Court of Appeals held that it need not address the District Court's grant of summary judgment on Cades' state-law claims, since Cades had not addressed those claims in his brief. *Id.* at 876 (Pet. 16a) (citing *United States v. Williams*, 378 F.2d 665, 666 (4th Cir. 1967)).

II. STATEMENT OF FACTS

The material facts are not in dispute.[6] Beneficial is a national banking association chartered under the National Bank Act. Its charter address is in Wilmington, Delaware. Block is a corporation that offers tax consultation and preparation services nationwide through a network of retail offices operated by Block and its franchisees. There is no corporate affiliation between Beneficial and Block.

Block offers its customers the opportunity to file their tax returns with the Internal Revenue Service electronically. For several years, including 1991 and 1992, the years covered by his Amended Complaint, Cades availed himself of this opportunity. Block charged to Cades its established fee charged to any customer who files a return electronically. This fee applies, regardless of whether the customer also applies for a RAL. No part of this fee is paid to Beneficial.

Beneficial has entered into an arrangement with Block, under which Block makes RAL applications available to customers of certain Block offices who file their tax returns electronically.

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[6] The material facts were established by uncontroverted affidavits filed in the District Court in connection with Respondents' motions for summary judgment. Cades did not argue in the Court of Appeals, and does not assert in his petition for certiorari, that there was any genuine dispute as to the material facts that would preclude the District Court from entering summary judgment.

It should be noted that the facts established in the District Court related to the RAL program as it existed during the time period covered by Cades' pleadings, and therefore do not take account of more recent changes to the RAL program.

Other Block offices make available RAL applications from lenders other than Beneficial. All Block offices (including those that make Beneficial RAL applications available to their customers) are established without any consultation with or involvement by Beneficial. Beneficial does not control or determine the location or hours of Block offices and does not supervise Block operations. No Beneficial personnel are located at Block offices, and the Block offices are not advertised or otherwise held out to be offices of Beneficial. Beneficial does not pay rent in any form to Block or own any interest in the Block offices.

If the customer of a Block office that makes Beneficial RAL applications available wishes to apply for a loan, Block transmits the application to Beneficial in Delaware. All processing of the loan application and review of the applicant's credit information are performed by Beneficial at its offices in Delaware. If the loan is approved, a cashier's check for the loan proceeds is issued by Beneficial National Bank and can be picked up by the customer at a local Block office.

In each of his RAL transactions in 1991 and 1992, Cades signed two critical documents. In the first document, the Application,[7] Cades provided various identifying information and authorized the release of the information on his tax return to Beneficial "for the purpose of enabling [Beneficial] to determine whether or not to make a Refund Anticipation Loan ('RAL') to me in response to my application." As the quoted language suggests, there is nothing in the Application that obligated Beneficial to make the loan or that obligated Cades to accept the loan if

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[7] The title of the Application in 1991 was "Priority Application, Consent, Certification and Authorization for Rapid Refund." In 1992, the title was "Priority Application, Certification and Authorization for Rapid Refund."

approved by Beneficial. The Application also authorized Beneficial to establish a deposit account in Cades' name and to have his tax refund deposited into that account. Finally, by signing the Application, Cades transferred to Beneficial his interest in the proceeds of the tax refund, to the extent of any RAL issued to him.

The other loan document, presented to the borrower only if the Application is approved, is a multi-purpose document containing (1) truth-in-lending disclosures on a detachable stub; (2) the actual "Loan Agreement," providing that the customer shall pay Beneficial, "on demand," the amount of the loan; and (3) the check made payable to the customer, constituting the loan proceeds. By endorsing the check, Cades signed and accepted the Loan Agreement, thereby obligating himself for the first time to repay the loan.

The stub attached to the Loan Agreement and check itemizes the finance charge assessed by Beneficial for the loan. Beneficial's charge for a RAL to South Carolina customers is a flat fee of $29, regardless of the amount of the loan. This interest charge is deducted from the proceeds of the loan before they are disbursed to the customer. No other charge is assessed by Beneficial.

ARGUMENT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE HOLDING THAT BENEFICIAL MAY CHARGE THE INTEREST PERMITTED BY THE LAW OF ITS HOME STATE, SINCE THAT HOLDING IS CONSISTENT WITH – AND COMPELLED BY – THIS COURT'S DECISION IN *MARQUETTE*.

Cades' usury claim alleges that the $29 interest charge assessed by Beneficial was in violation of section 85 of the National Bank Act. Section 85 provides that a national bank may "charge on any loan . . . interest at the rate allowed by the laws of the State, Territory, or District *where the bank is located* . . . ." 12 U.S.C. § 85 (emphasis added). As the statutory language makes clear, the limitations on interest that a national bank may charge are governed by the laws of the state where the *bank* is located, not the laws of the state where the *borrower* is located or the state where the loan is made. In the present case, Beneficial is located in Wilmington, Delaware, the address of its home office as stated in its charter. Accordingly, the Court of Appeals correctly concluded that Beneficial's flat $29 interest charge is lawful under section 85, because it is permitted by Delaware law.[8]

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[8] Cades' petition does not question the conclusion reached by both the Court of Appeals, 43 F.3d at 874 (Pet. 9a-10a), and the District Court that Delaware law permits the $29 interest charge assessed by Beneficial. *See* Del. Code Ann. tit. 5, § 965(1) (providing that "[i]n addition to or in lieu of periodic interest . . . a bank may charge and collect, as interest, . . . [l]oan fees . . . and other front-end . . . charges," provided that "the agreement governing . . . the loan so provides").

The leading case applying section 85 to interstate loan transactions is the unanimous opinion of this Court in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978). In *Marquette*, the First National Bank of Omaha ("Omaha Bank"), a national bank with its charter address in Nebraska, actively solicited credit card customers in Minnesota, through a subsidiary doing business in Minnesota, which acted as agent for the bank. *See id.* at 304-06. Participating correspondent banks in Minnesota solicited applications from prospective credit card customers on behalf of Omaha Bank. These Minnesota banks also served as depositories for credit card sales drafts and made cash advances to Omaha Bank's credit card customers, in exchange for a fee paid to the participating Minnesota banks by Omaha Bank. *See id.* at 311 n.24.

Suit was brought by the Minnesota attorney general and a Minnesota bank, seeking to enjoin Omaha Bank from charging its Minnesota credit card customers interest rates that were permitted by Nebraska law but in excess of the usury limit under Minnesota law. The Court rejected these claims. It held that despite the active solicitation of Minnesota customers through a subsidiary qualified to do business in Minnesota, and despite the role of the participating Minnesota banks, Omaha Bank was nevertheless "located" in Nebraska, at the address specified in its charter, for purposes of section 85. The Court noted that this meaning of the term "located" was intended by Congress when it enacted the National Bank Act:

> The congressional debates surrounding the enactment of § 30 [later recodified as section 85] were conducted on the assumption that a national bank was "located" for purposes of the section in the State named in its organization certificate. Omaha Bank cannot be

> deprived of this location merely because it is extending credit to residents of a foreign State.

Id. at 310 (citation omitted). The Court further rejected the contention that the role played by merchants and participating banks in Minnesota established a "location" for Omaha Bank in Minnesota for purposes of the credit card transactions. The Court explained:

> If the location of the bank were to depend on the whereabouts of each credit-card transaction, the meaning of the term "located" would be so stretched as to throw into confusion the complex system of modern interstate banking. A national bank could never be certain whether its contacts with residents of foreign States were sufficient to alter its location for purposes of § 85. We do not choose to invite these difficulties by rendering so elastic the term "located."

Id. at 312. Because the national bank was "located" in Nebraska, the Supreme Court held that it was entitled to "export" to borrowers in Minnesota the interest permitted under Nebraska law.

As the Court of Appeals concluded, Cades' claim under section 85 is controlled by a straightforward application of *Marquette*. Regardless of where Cades resides, where he applied for his loan, or where he received the loan proceeds, Beneficial is "located" in Delaware, its charter address, and the interest that it charges is therefore governed by the law of Delaware, not South Carolina. Cades' contention that the interest charge imposed by Beneficial is subject to the usury restrictions of the law of the borrower's state, rather than Beneficial's home state, is directly contrary to the holding in *Marquette*.

Cades does not expressly request that this Court reconsider its decision in *Marquette*, but in fact that is exactly what he would have the Court do. While Cades purports to rely on the solicitation efforts conducted on behalf of Beneficial in South Carolina, such efforts are legally indistinguishable from the solicitation activities conducted in *Marquette* on behalf of Omaha Bank in Minnesota. *See id.* at 302 ("[T]he solicitation of Minnesota merchants and banks is carried on by respondent First of Omaha Service Corp. . . . , a wholly owned subsidiary of [the national bank]."); *id.* at 304-05 (detailing services provided by First of Omaha Service Corp. in Minnesota for its national bank parent). As the stipulation of facts in *Marquette* recited:

> The First National Bank of Omaha has solicited and intends to solicit Minnesota residents *on a continuous and systematic basis*, in order to induce them to enroll in the First National Bank of Omaha's BankAmericard program. This solicitation program will be carried out by direct mail solicitation, telephone contact and *through Minnesota banks*.

Marquette Nat'l Bank v. First of Omaha Serv. Corp., 262 N.W.2d 358, 360 (Minn. 1977) (emphasis added), *aff'd*, 439 U.S. 299 (1978); *see also* 439 U.S. at 311 n.24 ("[P]articipating Minnesota banks . . . will advertise the BankAmericard plan and solicit applications for BankAmericards from Minnesota residents . . . .").

Cades' efforts to distinguish *Marquette* are completely unavailing. Cades argues that all of the papers relating to his RAL's were signed in South Carolina; by the same token, Omaha Bank's credit card customers enrolled in the program in Minnesota, signed cash advance slips or credit purchase slips in

Minnesota, and received their cash or merchandise there. Cades argues that he had "face-to-face" contact with Block personnel in South Carolina; by the same token, Omaha Bank's credit card customers had face-to-face contact with participating banks and merchants from whom they obtained cash advances and credit sales. Cades is simply not able to show any material difference between Beneficial's contacts with South Carolina customers and Omaha Bank's "continuous and systematic" solicitation of customers in Minnesota in *Marquette*.[9] If anything, Omaha Bank's contacts with Minnesota were more substantial than Beneficial's contacts with South Carolina, since Omaha Bank conducted solicitaions in Minnesota through a subsidiary, but there is no affiliation between Beneficial and Block.

In the seventeen years since this Court's unanimous decision in *Marquette*, the banking industry has structured billions of dollars of interstate loan transactions on the basis of the certainty

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[9] As the Court of Appeals explained:

> [Cades'] asserted differences [between this case and *Marquette*] are not convincing. It is undisputed that the loan was approved in Beneficial's Delaware office, not in South Carolina. The loan proceeds originated in Delaware and were later transmitted to South Carolina. Both *Marquette* and this case involve face-to-face solicitation of out of state consumers by agents of a national bank. In both instances, the interest rate a national bank may charge is governed by section 85, which looks to the interest rates allowed by the state where the bank is located – not where the borrower is located or where the loan transaction may be said to have occurred.

43 F.3d at 873-74 (Pet. 8a).

that that holding has provided.[10] Only the most compelling justification would be sufficient to overturn the settled expectations and understandings of this nationwide industry. *See, e.g., State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 457-58 (1962); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953). In the face of this long-standing and widespread reliance on the settled construction of section 85 under *Marquette*, Cades fails to state a single cogent reason why *Marquette* should be subject to reconsideration. Moreover, there has been no conflict among the decisions of the lower courts in applying this Court's opinion in *Marquette* to determine where a national bank is "located" under section 85.

The *Marquette* opinion also disposes of Cades' argument that the decision of the Court of Appeals, by allowing Beneficial to solicit loans through the offices of Block in other states, encourages evasion of federal restrictions on interstate branching by national banks. In *Marquette*, despite the extensive loan solicitation conducted by Omaha Bank through correspondent banks in Minnesota, the Court concluded that "[t]he bank operates no branch banks in Minnesota." 439 U.S. at 309. Thus, Cades' contention that the offices of Block in South Carolina should be

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[10] Indeed, the "exportation" principle of *Marquette* was met with such immediate and widespread approval that Congress promptly extended the doctrine to cover loans by federally insured state-chartered banks, *see* Depository Institutions Deregulation and Monetary Control Act of 1980, § 521, 12 U.S.C. § 1831d, federally insured savings and loan institutions, *see id.* § 522, 12 U.S.C. § 1463(g), and federal insured credit unions, *see id.* § 523, 12 U.S.C. § 1785(g). *See generally Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993).

held to be branches of Beneficial would again require reexamination of *Marquette*.[11]

Nor is reconsideration of *Marquette* justified by the recent *expansion* of the right of national banks to establish out-of-state branches, as effected by the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338. To the contrary, the Riegle-Neal Act specifically *preserves*

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[11] Cades' reliance on *First National Bank v. Dickinson*, 396 U.S. 122 (1969), is without merit. In that case, the question was whether an armored car *owned and operated* by a national bank, at which customers could make deposits and cash checks, constituted a branch of the bank. The Court set forth the critical facts as follows:

> The armored car was owned and controlled by the bank; the teller and driver-guard in the car were bank employees. The bank paid the cost of armored car operations . . . . The truck bore the name of the bank . . . . All movements and routing of the armored car were directed by the bank.

Id. at 128. In the present case, by contrast, the Block offices are not owned and controlled by Beneficial; Beneficial pays no rent to Block and has no tenancy, leasehold or ownership interest in any Block office. The personnel in the Block offices are not Beneficial employees; no Beneficial personnel are located at these offices. Beneficial does not pay the cost of operations of the Block offices. The Block offices do not bear the name of Beneficial; they are advertised and held out as Block, not Beneficial, offices. Finally, the activities of the Block offices are not directed by Beneficial; Block, not Beneficial, determines office locations, hours, and methods of operation. *See* 43 F.3d at 874 (Pet. 9a.)

The Court of Appeals thus concluded that the Block offices could not conceivably be held to be "branches" of Beneficial, since they were not "establish[ed] and operate[d]" by Beneficial. *Id.* (quoting 12 U.S.C. § 36(c) and citing *Independent Bankers Ass'n v. Marine Midland Bank, N.A.*, 757 F.2d 453 (2d Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986)).

the exportation doctrine under section 85, as interpreted in *Marquette*. Section 111 of the Act, entitled "Restatement of Existing Law," provides: "No provision of this title and no amendment made by this title to any other provision of law shall be construed as affecting in any way . . . the applicability of section 5197 of the Revised Statutes [i.e., section 85 of the National Bank Act]." 12 U.S.C. § 1811 note. In expressly preserving existing law under section 85 in the context of interstate banking, Congress undoubtedly was aware of the Court's statutory construction in *Marquette* and was endorsing the exportation doctrine enunciated in that opinion. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 & n.66 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). There is no need for this Court to reexamine the application of a statute where Congress itself has recently explored the issue and has endorsed the Court's long-standing construction.

Finally, Cades argues that the decision of the Court of Appeals, by allowing banks like Beneficial to "export" the interest permitted by the laws of their home states to borrowers in other states, will frustrate the application of more restrictive usury laws in the borrowers' states. Once again, *Marquette* provides the answer. As this Court held:

> Petitioners' final argument is that the "exportation" of interest rates, such as occurred in this case, will significantly impair the ability of States to enact effective usury laws. This impairment, however, has always been implicit in the structure of the National Bank Act . . . . But the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.

439 U.S. at 318-19.

Before the Court of Appeals, certain amici curiae in support of Cades expressed a concern that the lower courts' application of section 85 may be extended to *other* factual situations in which federal restrictions on interstate branching may be evaded. This inchoate fear, however, is no basis for disregarding the clearly established law under section 85. The ruling of the Court of Appeals applies to a particular factual situation, in which the operations of the Block offices indisputably are not controlled by Beneficial, and where there is no affiliation between Block and Beneficial. The determination whether the same reasoning would apply to a *different* set of facts, involving control or affiliation of the sort feared by Cades' amici, should await the presentation of a concrete case or controversy presenting those facts.

In short, while Cades insists that the decision of the Court of Appeals is contrary to *Marquette*, in fact it is Cades' own arguments that are inconsistent with *Marquette*. Moreover, Cades provides no reason -- much less a compelling one -- that this Court should reexamine the settled construction of a statute that has been relied upon by the banking industry for the past seventeen years, and that Congress itself has recently declined to alter. In short, there is no reason for the Court to grant certiorari to review the application by the Court of Appeals of the settled doctrine of *Marquette* in rejecting Cades' claims under section 85 of the National Bank Act.[12]

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[12] Cades also claims that Beneficial has violated section 81 of the National Bank Act, 12 U.S.C. § 81, requiring the general business of a bank to be conducted at its main office and established branches. Cades did not plead a claim under section 81 in the District Court, and it is therefore waived. In any event, since the inception of the Act, this Court has held that section

II. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW CADES' CLAIMS UNDER THE TRUTH IN LENDING ACT, WHICH TURN ON THE SPECIFIC LOAN DOCUMENTS SIGNED BY THE PARTIES.

A. Beneficial's Truth-in-Lending Disclosures Were Timely, Because the Loan Documents Make Clear that the Loan Was Not Consummated Until Cades Endorsed His Loan Proceeds Check.

One of Cades' claims under the Truth in Lending Act is that Beneficial, by including the TILA disclosures on the stub attached to the Loan Agreement, failed to provide the disclosures before the loan was "consummated," as required by section 226.17(b) of Regulation Z, 12 C.F.R. § 226.17(b).[13] Cades acknowledges

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81 should be interpreted "reasonably" and does not preclude a bank's conduct of business "by correspondents or other agents." *Merchants' Bank v. State Bank*, 77 U.S. (10 Wall.) 604, 651 (1871). Moreover, nothing in *Marquette* suggests that Omaha Bank's extensive solicitation activity in Minnesota placed it in violation of section 81. Finally, Cades cites no authority for the proposition that a violation of section 81, even if shown, would subject a bank to the usury law of a borrower's state, contrary to section 85.

[13] The Federal Reserve Board has adopted Regulation Z, 12 C.F.R. pt. 226, to implement TILA, pursuant to its authority under section 105 of the Act, 15 U.S.C. § 1604. *See* 12 C.F.R. § 226.1. In addition, the staff of the Division of Consumer and Community Affairs of the Federal Reserve Board issues the Official Staff Commentary, which constitutes official interpretations of the Act and Regulation Z. *See* 12 C.F.R. pt. 226, supp. I, cmt. I-1. These regulations and interpretations are authoritative and should be followed unless "demonstrably irrational." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). Moreover, TILA § 130(f), 15 U.S.C. § 1640(f), provides that good faith compliance by a creditor with an interpretation issued by the staff of the Federal Reserve Board constitutes a

that Beneficial's disclosures were timely if the loan was consummated at the time that he signed the Loan Agreement, but he insists that the loan was consummated previously, at the time that he signed the Application. He therefore contends that the disclosures should have been given at the time that he signed the Application. The Court of Appeals correctly determined, however, that Cades' argument cannot survive scrutiny of the written terms of the Application itself.

Section 226.2(a)(13) of Regulation Z defines "consummation" as "the time that a consumer becomes *contractually obligated* on a credit transaction." 12 C.F.R. § 226.2(a)(13) (emphasis added). Applying this definition, the lower courts have *uniformly* held that TILA disclosures need not be provided at the time that a consumer signs a loan application, unless by signing the application the consumer becomes "contractually obligated on a credit transaction." Contrary to the suggestion in Cades' petition, there is *no conflict* among the Circuits on this point. The two cases cited by Cades make clear that TILA disclosures must be provided prior to closing only when the terms of a loan application or other pre-closing document contractually bind the consumer to accept the loan that is provided by the lender; conversely, where the terms of the application do not have this effect, and the consumer first becomes contractually bound on a credit transaction at closing, then TILA disclosures may be provided at the closing itself, at any time prior to the consumer's execution of the loan agreement. *See Murphy v. Empire of America, FSA*, 746 F.2d 931 (2d Cir. 1984) (where loan commitment obligated consumers to proceed with loan, disclosures had to be given prior to signing of that document); *Waters v. Weyerhaeuser Mortgage Co.*, 582 F.2d 503, 505 (9th

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complete defense to claims for violation of the Act.

Cir. 1978) (in absence of such a pre-closing obligation, disclosures given at closing were timely); *see also Bissette v. Colonial Mortgage Corp.*, 477 F.2d 1245 (D.C. Cir. 1973); *Puckett v. Georgia Homes, Inc.*, 369 F. Supp. 614 (D.S.C. 1974); *Stavrides v. Mellon Nat'l Bank & Trust Co.*, 353 F. Supp. 1072, 1078-79 (W.D. Pa.), *aff'd*, 487 F.2d 953 (3d Cir. 1973). Since no case holds to the contrary, it is clear that Cades is attempting to manufacture the appearance of a conflict where none in fact exists.[14]

Cades' claim of untimely disclosure thus boils down to the question whether the terms of Beneficial's RAL Application "contractually obligated" him to accept a RAL if his Application was approved. Both the District Court and the Court of Appeals carefully scrutinized the language of the Application and determined that under applicable law, no such contractual obligation was created. There is no need for this Court to exercise its certiorari jurisdiction to reexamine the lower courts' construction of a particular form of loan document, especially where all four judges in the District Court and Court of Appeals have agreed on the appropriate construction.[15]

In any event, this construction of the Application is undoubtedly correct. There is nothing in the Application

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[14] Exceptions exist under Regulation Z for certain types of loans, such as certain residential mortgage transactions and certain variable-rate transactions, where there are special timing requirements based on the signing of the loan application. *See* 12 C.F.R. § 226.17(b). None of these exceptions apply here.

[15] Moreover, yet another District Judge has reached the same construction in another case asserting virtually the identical claim. *See Beckett v. H & R Block, Inc.*, 1994 U.S. Dist. LEXIS 17714 (N.D. Ill. Dec. 8, 1994).

submitted to Beneficial by Cades that "contractually obligated [him] on a credit transaction." 12 C.F.R. § 226.2(a)(13). To the contrary, Cades first became "contractually obligated" when he signed the Loan Agreement, through his endorsement of the RAL check. This was the same document that contained, on its stub, the truth-in-lending disclosures. Accordingly, before Cades signed the Loan Agreement, he had in his hand the truth-in-lending disclosures for his review. *See* Official Staff Commentary, 12 C.F.R. pt. 226, supp. I, cmt. 17(a)(1)-3 (disclosures "may be placed on the same document with the credit contract" and may appear "on the front or back" of the document).

Significantly, the only language cited by Cades, in support of his position that he became bound to take a loan by signing the Application, is a provision for the direct deposit of his tax refund by the IRS to Cades' account at Beneficial. Although the direction to the IRS is irrevocable, it does *not* contractually commit Cades to a credit transaction with Beneficial. If Cades had decided not to consummate the RAL, by declining to sign the Loan Agreement and endorse the RAL check, then his refund would have been available to him through his account at Beneficial, once it was transmitted by the IRS to that account as Cades had directed. As the Court of Appeals explained:

> [W]e reject Cades's argument that his irrevocable assignment of his tax refund to his account at Beneficial, through his direct deposit election on IRS Form 8453, effectively transferred all his rights in the refund to Beneficial. Funds in a depositor's account, absent an agreement to the contrary, represent a debt by the bank to the depositor and may be withdrawn by the depositor upon demand.

43 F.3d at 876 (Pet. 15a) (citing *Bank of Marin v. England*, 385 U.S. 99, 101 (1966)). The Court of Appeals further held, under the applicable state law of Delaware and South Carolina, that Beneficial had no enforceable security interest in Cades' tax refund until he signed the Loan Agreement by endorsing his RAL check. *Id.* (Pet. 14a).[16]

Because the decision below rests on the construction of a particular set of loan documents in accordance with applicable state law, and because the construction was in any event correct, Cades' claim of untimely disclosure under the TILA does not merit review by this Court.

B. Beneficial's Calculation of the Annual Percentage Rate Complies with Federal Reserve Board Requirements, Because the Loan Documents Make Clear that the RAL Is Payable on Demand.

Cades' other claim under the TILA relates to the manner of calculation of the annual percentage rate in the disclosures made by Beneficial. It is undisputed that Beneficial calculated the APR

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[16] Cades further argues that even if the loan was not consummated until he signed the Loan Agreement on the RAL check, the TILA disclosures were given to him "at the same time" as consummation, rather than "before" consummation. The argument rests on a verbal sleight-of-hand. Consummation did not occur at the "time that a check [was] handed to Cades," (Pet. 12), but at the *subsequent* time when Cades *endorsed* the check and thus signed the Loan Agreement. The Official Staff Interpretation and case law cited above, holding that TILA disclosures may be given at the loan closing and may appear on the same document as the promissory note, make clear that it is sufficient to hand the disclosures to the consumer immediately before the consumer signs the applicable contract. No case holds otherwise.

on the basis of a presumed one-year maturity date for the loan, pursuant to section 227.17(c)(5) of Regulation Z, which mandates a specific method of disclosure for demand obligations:

> If an obligation is payable on demand, the creditor shall make the disclosures based on *an assumed maturity of 1 year*. If an alternate maturity date is stated in the legal obligation between the parties, the disclosures shall be based on that date.

12 C.F.R. § 226.17(c)(5) (emphasis added).[17]

Cades acknowledges that the Loan Agreement that he signed provides that the loan is payable "on demand." He contends, however, that his loan also had an "alternate maturity date" that takes the loan out of the one-year maturity rule of section 227.17(c)(5). The Official Staff Commentary on this section of Regulation Z states: "Whether an alternate maturity date is stated in the legal obligation is determined by applicable law. " 12 C.F.R. pt. 226, supp. I, cmt. 17(c)(5)-1. Thus, resolution of this claim, like Cades' other TILA claim, depends on the language of the loan documents and applicable state law. As discussed above, such matters are not appropriate for review on certiorari by this Court.

Once again, the treatment of this claim by the Court of Appeals was thorough and proper. The Court of Appeals carefully reviewed the language of the loan documents and concluded that

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[17] Cades' Petition asserts that the Court of Appeals "failed to read" the second sentence of this provision. (Pet. 13.) In fact, the second sentence is quoted in full in the opinion of the Court of Appeals, 43 F.3d at 875 (Pet. 12a), and is the focus of the court's discussion of Cades' APR claim.

the loan was in fact a demand obligation and that no "alternate maturity date" was stated. The Court of Appeals specifically rejected Cades' contention that an "alternate maturity date" was established by IRS Form 8453, which states that the taxpayer's refund should be issued within three weeks after the IRS has accepted the taxpayer's return. As the Court of Appeals explained:

> Form 8453 says nothing about when the RAL is payable. It merely provides taxpayers an estimate of when refund checks will arrive. Nor does the loan agreement anywhere provide that the RAL is payable immediately after the IRS deposits the refund into the account at Beneficial. The agreement between Cades and Beneficial is, by its terms, a demand obligation. Beneficial properly based the APR of the loan on a maturity date of one year.

43 F.3d at 875 (Pet. 13a). The Court of Appeals further recognized that under the comment issued by the Federal Reserve Board dealing specifically with refund anticipation loans, the existence of an "alternate maturity date" is to be determined "under the terms of the legal obligation," and *not* on the basis of the "practice of a creditor to demand repayment upon delivery of refunds."[18]

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[18] Comment 17 of the Official Staff Commentary on section 226.17(c)(1) of Regulation Z, 12 C.F.R. pt. 226, supp. I, cmt. 17(c)(1)-17, is entitled "Special Rules for Tax Refund Anticipation Loans." It is quoted in full in the appendix hereto.

There is, in short, no need to grant certiorari on this unique issue, the resolution of which depends on the terms of the particular loan documents signed by the parties.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

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APPENDIX

APPENDIX OF STATUTES AND REGULATIONS

Section 81 of the National Bank Act, 12 U.S.C. § 81 (Rev. Stat. § 5190) provides:

Place of business

The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 5155 of the Revised Statutes, as amended by this Act.

Section 85 of the National Bank Act, 12 U.S.C. §85 (Rev. Stat. § 5197) provides:

Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding

> 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

Section 111 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338, 2365 (codified at 12 U.S.C. 1811 note) provides:

> **Restatement of Existing Law**
>
> No provision of this title and no amendment made by this title to any other provision of law shall be construed as affecting in any way –
>
> > (1) the authority of any State or political subdivision of any State to adopt, apply, or administer any tax or method of taxation to any

bank, bank holding company, or foreign bank, or any affiliate of any such bank, bank holding company, or foreign bank, to the extent that such tax or tax method is otherwise permissible by or under the Constitution of the United States or other Federal law;

(2) the right of any State, or any political subdivision of any State, to impose or maintain a nondiscriminatory franchise tax or other nonproperty tax instead of a franchise tax in accordance with section 3124 of title 31, United States Code; or

(3) the applicability of section 5197 of the Revised Statutes or section 27 of the Federal Deposit Insurance Act.

Section 226.2(a)(13) of Regulation Z, 12 C.F.R. § 226.2(a)(13) provides:

Definitions and rules of construction.

(a) *Definitions.* For purposes of this regulation, the following definitions apply:

* * * *

(13) *"Consummation"* means the time that a consumer becomes contractually obligated on a credit transaction.

Section 226.17(b) of Regulation Z, 12 C.F.R. § 226.17(b) provides:

> **General disclosure requirements.**
>
> * * * *
>
> (b) *Time of disclosures.* The creditor shall make disclosures before consummation of the transaction. In certain residential mortgage transactions, special timing requirements are set forth in § 226.19(a). In certain variable-rate transactions, special timing requirements for variable-rate disclosures are set forth in § 226.19(b) and § 226.20(c). In certain transactions involving mail or telephone orders or a series of sales, the timing of disclosures may be delayed in accordance with paragraphs (g) and (h) of this section.

Section 226.17(c)(5) of Regulation Z, 12 C.F.R. § 226.17(c)(5) provides:

> **General disclosure requirements.**
>
> * * * *
>
> (c) *Basis of disclosures and use of estimates.*
>
> * * * *
>
> (5) If an obligation is payable on demand, the creditor shall make the disclosures based on an assumed maturity of 1 year. If an alternate maturity

> date is stated in the legal obligation between the parties, the disclosures shall be based on that date.

Official Staff Comment 3 on section 226.17(a)(1) of Regulation Z, 12 C.F.R. pt. 226, supp. I, cmt. 17(a)(1)-3 provides:

> *Location.* The regulation imposes no specific location requirements on the segregated disclosures. For example:
>
> - They may appear on a disclosure statement separate from all other material.
>
> - They may be placed on the same document with the credit contract or other information, so long as they are segregated from that information.
>
> - They may be shown on the front or back of a document.
>
> - They need not begin at the top of a page.
>
> - They may be continued from one page to another.

Official Staff Comment 17 on section 226.17(c)(1) of Regulation Z, 12 C.F.R. pt. 226, supp. I, cmt. 17(c)(1)-17 provides:

> *Special rules for tax refund anticipation loans.* Tax refund loans, also known as refund anticipation loans (RALs), are transactions in which a creditor will lend up to the amount of a consumer's expected tax refund.

RAL agreements typically require repayment upon demand, but also may provide that repayment is required when the refund is made. The agreements also typically provide that if the amount of the refund is less than the payment due, the consumer must pay the difference. Repayment often is made by a preauthorized offset to a consumer's account held with the creditor when the refund has been deposited by electronic transfer. Creditors may charge fees for RALs in addition to fees for filing the consumer's tax return electronically. In RAL transactions subject to the regulation the following special rules apply:

- If, under the terms of the legal obligation, repayment of the loan is required when the refund is received by the consumer (such as by deposit into the consumer's account), the disclosures should be based on the creditor's estimate of the time the refund will be delivered even if the loan also contains a demand clause. The practice of a creditor to demand repayment upon delivery of refunds does not determine whether the legal obligation requires that repayment be made at that time; this determination must be made according to applicable state or other law. (See comment 17(c)(5)-1 for the rules regarding disclosures if the loan is payable solely on demand or is payable either on demand or on an alternate maturity date.)

- If the consumer is required to repay more than the amount borrowed, the difference is a finance charge unless excluded under § 226.4. In addition, to the extent that any fees charged in connection with the loan (such as for filing the tax return electronically) exceed those fees for a comparable cash transaction (that is,

filing the tax return electronically without a loan), the difference must be included in the finance charge.

Official Staff Comment 1 on section 226.17(c)(5) of Regulation Z, 12 C.F.R. pt. 226, supp. I, cmt. 17(c)(5)-1 provides:

> *Demand disclosures.* Disclosures for demand obligations are based on an assumed 1-year term, unless an alternate maturity date is stated in the legal obligation. Whether an alternate maturity date is stated in the legal obligation is determined by applicable law. An alternate maturity date is not inferred from an informal principal reduction agreement or a similar understanding between the parties. However, when the note itself specifies a principal reduction schedule (for example, "payable on demand or $2,000 plus interest quarterly"), an alternate maturity is stated and the disclosures must reflect that date.

Del. Code Ann. tit. 5, § 965(1) provides:

> **Interest Charges.**
>
> In addition to or in lieu of periodic interest at a periodic percentage rate or rates permitted by §§ 963 and 964 of this title, a bank may charge and collect, as interest, in respect of a loan:
>
> (1) Loan fees, points, finders fees and other front-end and periodic charges; provided, however, that in the case of a loan to an individual borrower, no such front-end or periodic charge may be charged and

collected unless the agreement governing, or the bond, note or other evidence of, the loan so provides;

(2) Reasonable fees for services rendered or for reimbursement of expenses incurred in good faith by the bank or its agents in connection with such loan, including, without limitation, commitment fees, official fees and taxes, premiums or other charges for any guarantee or insurance protecting the bank against the borrower's default or other credit loss, or costs incurred by reason by examination of title, inspection, recording and other formal acts necessary or appropriate to the security of the loan, filing fees, attorney's fees and travel expenses; provided, however, that in the case of a loan to an individual borrower, no such fee may be charged and collected unless the agreement governing, or the bond, note or other evidence of, the loan so provides.